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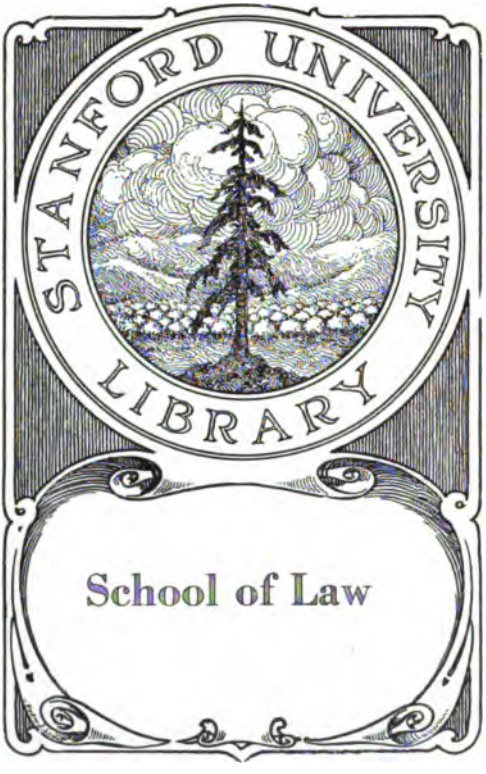
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CANADIAN LAW TIMES

EDITED BY

A. H. F. LEFROY, M.A. (Oxon.), K.C.

(Deceased, March, 1919)

A. T. HUNTER

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INDEX OF SUBJECTS

PAGE

Administration of Criminal Law—
A. H. Russell 605
Alberta's First Divorce 228
Alward, Silas, K.C., D.C.L. 466
American Views of the Right of Sepulture..... 487
Arising out of and In Course of Employment—
George A. Kingston 204
Arrangement of English Law, The—
Herbert A. Smith 677
Autocracy of Workmen's Compensation Boards..... 295

Bolshevism—The Effect of Bolshevism on Contracts..... 226
British North America Act—Agreement of Grant?—
A Falconer 266, 695
By the Way 1, 65, 125, 201, 264, 330, 460, 509, 619, 697

Canadian Bar Association—
A Code of Legal Ethics—
Hon. Mr. Justice William Renwick Riddell..... 620
Address of the President, Sir James Aikins, K.C..... 537
Report of the Committee on Legal Ethics—
Angus MacMurchy, Convenor 702
Council and Committees, 1919-20 654
Report of Committee on Legal Education 655
Report of Committee on Administration of Justice..... 660
Canon Law 632
Civilian Problem, A.—
Marvin Leslie Hayward 391
Companies Act, The (Bonanza Creek Mining Co. Case)—
Thomas Mulvey, K.C. 79
Consolidation and Tacking—
John D. Falconbridge 17
Constitution of Canada: Canada's Suzerainty over the West—
Bram Thompson, M.A., Barrister-at-Law..... 417
Contemporary Legal Reviews and Periodicals 53, 113, 176
Copyright: Eating the Cherries and Catching the Stones..... 554
Correspondence 58, 120, 186
County Judges Act, 1919—
M. J. Gorman, K.C. 282
Criminal Law and a Light Horse Magistrate..... 462
Current Commentary upon Recent English and Canadian Decisions 41, 102, 170

PAGE

Damages for Nervous shock caused by Spoken Words—
Rt. Hon. Sir Frederick Pollock 687
Deportation of Aliens who Advocate the Overthrow of Government Force 706
Divorce 553

Every-Day Legal Topics: The Neighbour's Overhanging Apple Tree 227
Exchequer Court of Canada 411

Famous Lord Chancellor of the Golden Age of Equity, A—
Silas Alward, K.C., D.C.L. 347
Fees on Commercial Matters 700
Foreclosure—Does Foreclosure under the Land Titles Act Extinguish the Mortgage Debt?—
James Edward Hogg 145
Froissart, A Chapter from 163

Gazettes, The 122, 194, 243, 673
Grotius Legend, The 277
Growth of Canadian Independence 372

Halifaxing the Judges: Why not make the Judges Punch the Time Clock? Concerning the Dignity and Independence of a Judge 438
Homestead and Exempted Property in Saskatchewan: Creditor's Rights—
Bram Thompson, M.A. 335
How Riots are Paid for 368
How They Cremate Dead Charters in Manitoba 599

Independence of Judges 709
International Law: Viscount Finlay's Two Addresses 557
Is it Hereditary or Merely Communicable? 367

John Highet Thom, An Appreciation by John A. Paterson, K.C. 224
Johnston, The Late E. F. B., K.C. 69

Laws to Abolish H. C. L. 387
Lefroy, A. H. F.—In Memoriam—
Prof. W. P. M. Kennedy 197
Legal Education—
Professor R. W. Lee 138
Legal Education—
G. F. Henderson, K.C. 142
Legal Ethics—
Report of the Canadian Bar Association 702

PAGE

Legal Fictions—
M. L. Hayward 34, 478
Legal Responsibility for Prayer 390
Limited Value of Economic Studies 385
Local and Personal..... 62, 123, 195, 244, 319, 380, 534, 604, 675, 719
London Letter 6, 71, 130, 361, 381, 472, 514, 549, 615, 689

Man who is not the Chauffeur, The..... 236
Marriage Anomaly, A—
His Honour Judge Swanson 321
Mediaeval Roman Canon Law, A Brief History of—
Prof. Charles P. Sherman, D.C.L..... 638
Moratorium Laws as to the—
Existing French Laws: Adjournments and Delays—
Camille Denoyer, Advocate 634

New Books and New Editions 59, 188, 238, 385, 519, 600
New Law Course at McGill—
Dean R. W. Lee 168
Notable Bicentenary, A.—
J. Murray Clark, K.C. 77

Obituary..... 69, 197, 245, 320, 380, 466, 535, 673, 720

Parliamentary Divorce in Canada—
Bram Thompson 253
Piratical Bonusing of Industries 632
Premier Drury on the Administration of Criminal Law..... 682
Privy Council and Greek Catholic—
W. L. Scott 229
Protection of Public Authorities from Vexatious Actions (And Temperance Legislation)..... 684

Recent Supreme Court Decisions 246, 374, 412, 711
Responsibility of Accountants—
Property in a Pseudonymn 615

Salaries of County Judges—
M. J. Gorman, K.C. 408
Salaries of Supreme Court Judges in Manitoba and the other Provinces—
Western Lawyer 28
Single Chamber Legislation, Two Experiments with a—
W. B. Ross 150
Sitting at the Feet of Gamaliel Americanus 288
Supreme Court Decisions 246, 374, 412, 711
Swedish System—
Ernest Heaton 597

PAGE
Temperance Legislation 594, 684
Thom, John Highet 224
Toronto and York Law Association..... 137

Unrest on the Bench also 345

Webb *v.* Outram (Australia) 453, 454 455
When Sentiment Turned the Scale..... 468
Where the Lower Court Overrules the Higher..... 663
Woman Lawyers in the Maritime Provinces 674
Women as Practitioners of Law 223
Workmen's Compensation—
Geo. A. Kingston 204

SPECIAL REVIEWS OF BOOKS

PAGE
Carnegie Endowment for International Peace....190, 191, 192, 385, 601, 603

Denman's Digest of Indictable Offences..... 60

Ghose—Comparative Administrative Law with Special Reference to the Organization and Legal Position of the Administrative Authorities in British India..... 519
Grotius Society Publications 188
Harris Criminal Law 462
Harvard Law School Memorial Volume.....60, 62
Lefroy's Short Treatise on Canadian Constitutional Law..... 238
(Review by J. Murray Clark, K.C.)
Scott—James Madison's Notes of Debates in the Federal Convention of 1787 288
Scott—Judicial Settlement of Controversies between States of the American Union decided in the Supreme Court of the U.S. 600
Shortt—Early Economic Effects of the European War Upon Canada 241
Simonton—Reconstruction and Amalgamation of Joint Stock Companies 520
Sutherland—Constitutional Power and World Affairs..... 291

INDEX OF CONTRIBUTORS

PAGE

Aikins, Sir James, K.C.—
Address Canadian Bar Association..... 537
Alward, Silas, K.C., D.C.L.—
A Famous Lord Chancellor of the Golden Age of Equity... 347

Clark, J. Murray, K.C.—
A Notable Bicentenary 77

Denoyer, Camille—
Laws as to the Moratorium..... 634

Falconbridge, John D., M.A., LL.B.—
Consolidation and Tacking 17, 193
Falconer, A., K.C.—
The British North America Act—Agreement or Grant..... 266
Finlay, Viscount—
International Law: Two Addresses 557

Gorman, M. J., K.C.—
The County Judges Act 282

Hayward, M. L.—
A Civilian Problem 391
Legal Fictions 11, 34
The Appeal to Cæsar 478
The Fool's Paradise 521
Heaton, Ernest—
Temperance Legislation; The Swedish System 597
Henderson, G. F., K.C.—
Legal Education 142
Hogg, James Edward—
Does Foreclosure Under Land Titles Acts Extinguish the Mortgage Debt? 145
Holland, T. E. 176

Kennedy, W. P. M., M.A., Litt. Dr.—
In Memoriam, A. H. F. Lefroy..... 197

Lee, Prof. R. W.—
Legal Education: A Symposium 138

Mulvey, Thomas, K.C.—
The Companies Act, with special reference to Bonanza Creek Mining Case 79

PAGE

Paterson, John A., K.C.—
John Highet Thom: An Appreciation 224
Pollock, Rt. Hon. Sir Frederick—
Damages for Nervous Shock Caused by Spoken Words (From L.Q.R.) 687
Popple, A. E.—
Criminal Procedure—Criminal Appeals..... 489

Ross, W. B.—
Two Experiments with a Single Chamber Legislature..... 150
Russell, A. H.—
Administration of Criminal Law 605

Scott, W. L.—
The Privy Council and Greek Catholic..... 229
Sherman, Prof. Charles F., D.C.L.—
A Brief History of Mediaeval Roman Canon Law..... 638
Smith, Herbert A.—
The Arrangement of English Law 677
Swanson, His Honour Judge—
A Marriage Anomaly 321

Thompson, Bram, M.A., Barrister-at-Law—
Our Bogus Dominion Land Code..... 494
Parliamentary Divorce in Canada 253
The Constitution of Canada: Canada's Suzerainty Over the West 417
The Homestead and Exempted Property in Saskatchewan.. 335

Western Lawyer—
Salaries of Superior Court Judges in Manitoba and other Western Provinces 28

INDEX OF CASES CITED

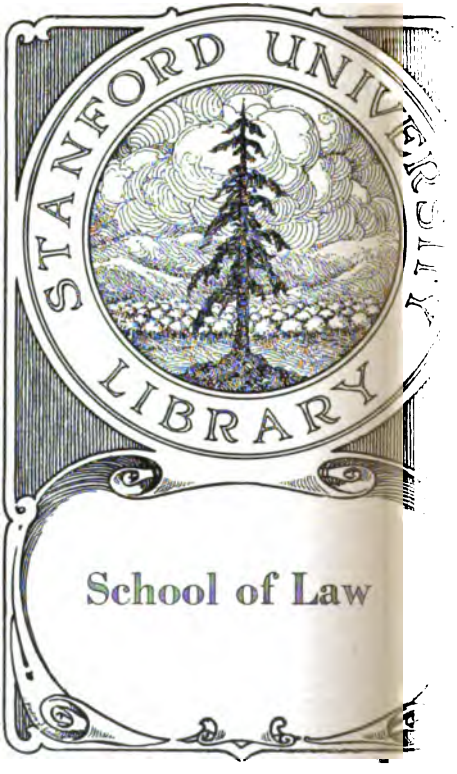
A.

PAGE

Ably *v.* Dale 306
Abbott *v.* Saint John 453, 454, 458
Adams *v.* Claxton 27
Adolph Lumber Co. *v.* Meadow Creek Lumber Co. 250
A. F. T. Corporation *v.* Pathe Exchange 66
Alberta Rolling Mills *v.* Christie 249
Aldridge *v.* Paterson 511
Allcock *v.* Rogers 214
A. Macdonald Co. *v.* Harmer 415
Anderson *v.* Dunn 671
Andrews *v.* Mitchell 304-5
Ashbury Railway Carriage Co. *v.* Riche 80, 86, 91, 92, 95
Ashley and Smith, Ltd., Ashley *v.* The Company 110
Attorney-General *v.* Sillem 666
Attorney-General of Canada *v.* Cain 274
Attorney-General for Ontario *v.* Railway Passengers Ass. Co.. 111

B.

Baggs' Case 305, 307
Baker *v.* City of Toronto 368
Banbury *v.* Bank of Hamilton 41
Bank of Hamilton *v.* Hartery 247
Bank of New South Wales *v.* Piper 669
Baxter *v.* Commissioners of Taxation for New South Wales.... 455
Beaumont and Barrett 670
Bentley's Case (Dr.) 306-7
Bird *v.* Wenn 23
Board *v.* Board 476
Bonanza Creek Mining Case....82, 84, 87, 89, 90-1-2-3-6, 99-100, 173, 274, 309, 318, 713
Bonnacher *v.* Evans 307, 309
Bourne *v.* Keane 382
Boston *v.* Lelievre 666, 668
Bovey *v.* Shipwith 17, 25
British Columbia Electric Railway Co. *v.* Stewart 666, 668
Brook *v.* Brook 322
Brooks and Delcomyn, *In re* 299
Brower *v.* Canada Permanent Building Association 24
Brown *v.* Cocking 301


STANFORD UNIVERSITY
LIBRARY
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PAGE

der de Quebec 51
..... 456
mon Club 248
..... 687
..... 51
..... 323-4

E.

Co. v. The National Benefit Assur-
..... 226
..... 105
..... 80-81, 84, 98-101
ank 47
..... 323-4
..... 247
..... 301

F.

..... 23
Stinson 25
al Omnibus Co. 50
.....315-16
..... 27
..... 413
.....145, 147, 148, 149
..... 308
.....510-11
.....684-693
..... 671
..... 617
..... 23
..... 713
..... 457

G.

..... 357
y Co. 414
..... 247
..... 283-4
..... 314
..... 685
Bain 377
..... 413
..... 308

C.

PAGE

Calgary and Edmonton Railway Co. *v.* The Saskatchewan Land and Homestead Company 717
Canadian Northern Railway Company *v.* Herbert Wilson *et al.* 295
Canadian Pacific Railway Company *v.* Albion 713
Canadian Pacific Ry. Co. *v.* Department of P. W. of Ontario.... 251
Canadian Pacific Ry. Co. *v.* Hartery 250
Canadian Pacific Ry. Co. *v.* Ottawa Insurance Co..... 90-1
Capell *v.* Child 307, 309-10
Carter, *ex parte* 22
Casaubon *v.* Bedard 52
Casdagli *v.* Casdagli 74
Case Threshing Marchine Co. *v.* Mitten 711
Channel Coaling Co. *v.* Ross *et al.* 299
City of Toronto *v.* Morson 410
City of Winnipeg *v.* Winnipeg Electric Ry. Co. 298
Clarkson *v.* Dominion Bank 375
Cobalt, Town of *v.* Temiskaming Telephone Co. 415
Collector *v.* Day 456-7
Coleman *v.* Winch 27
Com. *v.* Mann 458
Commercial Properties Ltd. *v.* La Compagnie Leduc 52
Conlon, *In re*..... 341
Cooper *v.* N. E. Railway Co. 214
Cooper *v.* The Board of Works for the Wansworth District.... 306
County Courts of British Columbia, *Re*..... 285
Cox *v.* Hakes 671, 713
Crockett *v.* International Railway Co. 486
Crowe, *Re* 671
Cummins *v.* Fletcher 18, 19
Cushing and Du Puy 668

D.

Dalgleish, *Re* 671
Deacon *v.* Webb 455
Delmonico's, *In re* 468
Delorme *v.* Cusson 712
D'Emden and Peder 455
Dennis *v.* White 206-7-8, 214, 217
Depatie *v.* Tremblay 67
Derry *v.* Peek 249
De Vall *v.* Gorman 249
Diamond *v.* Western Realty 377
Dominion Savings & Investment Society *v.* Kittridge..... 25
Dominion Trust Co. *v.* Mutual Life Assurance Co. 52
Douglas *v.* Mutual Life Assurance Co. 145, 147

PAGE

Drapeau *v.* La Cour du Recorder de Quebec 51
Dubbins *v.* Erie County 456
Duchaine *v.* Matamajaw Salmon Club 248
Dulieu *v.* White 687
Dunstan *v.* Dunstan, *In re* 51
Ellerton *v.* Gastrell 323-4

E.

Eastern Carrying Insurance Co. *v.* The National Benefit Assurance Co. 226
Edmonson *v.* Birch & Co. 105
Edwards *v.* Blackmore 80-81, 84, 98-101
Egbert *v.* National Crown Bank 47
Ellerton *v.* Gastrell 323-4
Entwistle *v.* Lenz 247
Errington, *Re* 301

F.

Farmer *v.* Pitt 23
Federal Life Assurance Co. *v.* Stinson 25
Fenerheerd *v.* London General Omnibus Co. 50
Fenton *v.* Thorley 315-16
Ferguson *v.* Frontenac 27
Findlay *v.* Howard 413
Fink *v.* Robertson (Australia) 145, 147, 148, 149
Fisher *v.* Keane 308
Flannagan *v.* Fellisk 510-11
Fletcher & Son *v.* Jubb 684-693
Fowler *v.* Barstowe 671
Fox *v.* Morrish & Co. 617
Fraser *v.* Nagle 23
Fraser *v.* Tupper 713
Freedman *v.* Segal 457

G.

Galton *v.* Hancock 357
Gavin *v.* Kettle Valley Railway Co. 414
Gibson *v.* Burns 247
Gibson *v.* McDonald 283-4
Gibson *v.* Wormald 314
Goldberg *v.* Cruickshank 685
Grand Trunk Railway Co. *v.* Bain 377
Granger *v.* Brydon-Jack 413
Gravel *v.* L'Union St. Thomas 308

PAGE

Neve *v.* Pennell 19
Newman *v.* Newman 206

O.

O'Connor *v.* Kennedy 322
Olympia Oil and Coke Co., Ltd., and MacAdam, Moreland and Co. 106

P.

Painter *v.* The Liverpool Oil Gas-Light Co. 308
Parnell *v.* Page 456
Parsons *v.* Somerset 211
Patnode *v.* Foote 237
Patten *v.* Rea 512
Pelly *v.* Wathem 18
Pennell *v.* Deffell 671
Permanent Trustee Co. *v.* Fels 47
Pettine, *Ex parte* 708
Piel Ke-ark-an *v.* Reginam 284
Pierce *v.* Provident 206
Pierse *v.* New Hampshire 670
Pile *v.* Pile 27
Pledge *v.* White 18, 19, 21, 22, 25
Pope *v.* Onslow 17, 22
Pringle *v.* Town of Napanee 390
Purdy *v.* Colton 343

Q.

Quinn *v.* Leathem 715

R.

Raggett, *In re* 21
Rakim, *Re* 671
Raleigh *v.* Goschen 311, 318
Reeves *v.* Konschur 26
Regina *v.* Brighton Inhabitants 323
Regina *v.* Hunt 669
Regina *v.* Roblin 322
Reid *et al. v.* Collister *et al.* 717
Reid, Hewith & Co. *v.* Joseph 43
Rex *v.* Caskin 307
Rex *v.* Chancellor of the University of Cambridge (Dr. Bentley's Case) 306
Rex *v.* Evans 666
Rex *v.* Gartshore 663

PAGE

Rex *v.* Grass 411
Rex *v.* Hare and Mann 350
Rex *v.* John M. Kilbourn 411
Rex *v.* Jou Jang How 712
Rex *v.* Lorette 51
Rex *v.* Lovitt 269
Rex *v.* Special Commissioners of Income Tax, *Ex parte* Dr. Barnardo's Homes 516
Rex *v.* Sit Quin 667
Richardson *v.* Horton 27
Riche *v.* Ashbury Railway Carriage Case 87, 93-4-7-9, 100
Riley *v.* Apedaile 714
Roff *v.* British and French Manufacturing Co. and Gibson..... 104
Rolfe *v.* Chester 26, 27
Ross *v.* Stevenson 18
Royal Bank of Canada *v.* The King 174, 269
Royal Bank of Canada *v.* Skene *et al.* 716
Russell *v.* Stubbs 552

S.

Sale *v.* Phillips 672
Salomon *v.* Salomon and Co. 668
Schofield *v.* Emerson 711
Scott *v.* Shepherd 407
Scott *v.* Swanson 25
Scottish American Investment Co. *v.* Tennant 20
Selby *v.* Pomfret 19, 22
Sharp *v.* Richards 20
Sheldon *v.* Needham 206
Shepard and the Merchants Bank and British Dominion General Insurance Co. *v.* Shepard and the Merchants Bank and Glens Falls Insurance Co. 412
Sheppard *v.* Sheppard 326
Sherwood *v.* Bay 322
Shuttleworth *v.* Laycock (1684) 17
Sidney *v.* Bourke 670
Siemens Bros. & Co. *v.* Barnes 109
Silverthorn *v.* Glazebrook 18, 19
Smith *v.* Bailey 511
Smith *v.* Provincial Treasurer of Nova Scotia 374
Smith *v.* The Queen 307, 309
Spaner Bros. *v.* Central Express Co. 112
Speal *v.* City of Toronto 368
Stubbs Ltd. *v.* Mazore 552
Sundine, *Re* 209
Sutton Hospital Case (1612) 88, 91, 97

T.

PAGE
Tassel v. Smith 19
Tatham, *Re* 344
Telghman v. Proctor 670
Thomas v. Thomas 26
Thomson v. Merchants Bank of Canada 246
Thomas v. Moore 686
Thompson v. Ingham 301
Thorogood v. Bryan 671
Tiderington, *Re* 671
Todd v. Linklater 20
Trimble v. Hill 669
Troughton v. Troughton 27
Turpin v. Victoria Palace, Limited 49
Tweedale v. Tweedale 19

U.

Union Assurance Co., *In re* 19
U.S. Playing Card Co. v. Hurst 374

V.

Velesky, Ltd. v. Inland Revenue Commissioner 670
Vestry of St. Mary v. Goodman 671
Victorian Railway Commissioners v. Coultas 687
Vieullette v. The King 376
Vint v. Paget 22

W.

Walker v. Walker 178, 475-6
Walsh v. Smith 175
Warner v. Couchman 217
Watt v. Watt 326, 476
Watts v. Symes 19, 22
Wayman v. The Perseverance Lodge 305
Weiss v. Silverman 248
Weld-Blundell v. Stephens 105
Weyburn Townsite Co., Ltd. v. Honsberger 172
Whitely Ltd. v. Hilt 108
Wilding v. Sanderson 716
Wilkinson v. Dounton 687
Woodruff v. Attorney-General of Ontario 269
Wrigley v. Nasmythe 211

Y.

Young v. Grote 44, 45

The Canadian Law Times.

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BY THE WAY.

The *Canadian Law Times* commences the new year full of hope and good intentions. Diligently it will continue its endeavours to be all things to all lawyers, —practical to the practical, idealistic to the idealistic, but most of all hoping to gain the good opinion of those who are both practical men and idealists,—who will have none of the practice of the law, without its principle, none of its lucre without its honour; who agree with the old Roman jurist Ulpian, that the law, worthily understood, comprises, in a very real sense, 'a knowledge of things human and divine, the science of the just and the unjust'; who feel the full force of the great saying,—What doth it profit a man if he gain the whole world, and lose his own soul!

* * *

We are interested to see in a recent issue of that bright little English legal periodical *Law Notes* a complimentary reference to the "Legal Fiction" by Mr. M. L. Hayward which we published last March. We publish another this month which we think will be found equally entertaining, and at the same time instructive. *Qui miscuit utile dulci* is always welcome.

* * *

We are glad to give additional publicity to a notice recently issued by Mr. James R. Forsyth, for the Custodian of Enemy Property, and for the Enemy

Debts Committee, requiring information from all classes of Canadian citizens in connection with enemy property.

* * *

We are very glad to aid in giving publicity, also, to the notice issued by Mr. H. A. Kennedy, head of the Editorial Branch of the Department of Soldiers' Civil Re-Establishment, 22 Vittoria Street, Ottawa, respecting the Sets of Lantern Slides which have been prepared to illustrate the various steps in the invalided soldier's climb back from "down and out" to "up and in again." These Lantern Slides will be sent, free of charge, on loan to ministers and other responsible speakers who realize the vital need of spreading information on this great national enterprise among all classes of the people. Posters, also, to announce the lecture are supplied in advance. Application should be made as early as possible, for Eastern Ontario, up to and including Belleville and North Bay, to Editorial Branch, Department of Soldiers' Civil Re-establishment, Ottawa; and for Western Ontario, to Assistant Director, Department of Soldiers' Civil Re-establishment, 185 Spadina Ave., Toronto.

* * *

If there is any real fear of Bolshevism rearing its ugly head some day even on this continent, as some think there is, would it not be well to undermine its line of advance, rather than trust to overwhelm it when it appears. Why has no one suggested including a simple text book on the elements of private law in the curriculum of our public schools? Such a text book would tend to implant in the minds of the young a respect for and understanding of the nature and object of Law, and its twin sister Order. To have such respect and understanding implanted early in the minds of those who are destined to form our "working men" and "working women" of the future, would be quite as valuable as it would be to give to them

some knowledge and understanding of the principles of political economy and of the law of supply and demand.

We may reasonably say that Law, as we have it now, is the outcome of an honest attempt of some of the acutest minds of many generations to regulate the relations and transactions and, generally, the life of the community in accordance with reason, justice, logic, and public expediency; and, therefore, a text book explaining in very simple language the elements of our Private Law would be, in itself, though indirectly, a training in reason and logic and in accuracy and preciseness of much value, and all the more so as being of a practical and concrete, and not of a purely abstract kind. Of course by Private Law we mean the rules governing the relations and transactions of private persons as regards property, contract, civil wrongs, etc., as distinguished from public law which covers constitutional and criminal law.

The advantage to every young man and woman in these days when we aim, so far as possible, at equality of opportunity for all, of having some elementary idea of the laws under which they have to live and work can scarcely be disputed, and the greater the growing tendency among the public and their leaders to advocate changes of a revolutionary character in public and private law, the greater is the importance that those inclined in this direction should have some slight understanding of the existing nature and rules of law before they set about changing them. Cicero tells us that in his day every school boy had to learn by heart the Twelve Tables of the law,—one evidence, assuredly, of the strong, practical common-sense of the ancient Romans.

It would be quite possible to prepare a small text book stating in simple language the fundamental divisions and distinctions and rules of private law; and embracing, if desired, a sketch or outline of our Can-

adian Federal and Provincial and Municipal Constitutions, and by whom our various judges and magistrates are appointed, and how the members of the Dominion parliament and of our Ontario legislature are elected; but it might be wiser to have separate text books—one for private and one for public law.

* * *

Mr. J. A. Strahan has collected all the best of our old friends in his stories about "The Bench and Bar of England" in the November and December *Blackwoods;* and has added a first class "howler" from an examination paper:—

"The Court of Chancery was called a Court of Conscience because it intervened to compel the defendant to soil his conscience; and it acted in this way because the early Chancellors were all ecclesiastics. Hence the maxim that Equity acts *in parsonam.*"

De gustibus non disputandum where good stories are concerned; but the one which so far has most affected our own facial muscles is the following of an Old Bailey criminal lawyer of the old style:—

'This gentleman had severely cross-examined one of the leading witnesses for the prosecution, and when he came to address the jury he commented equally severely on the witness's evidence. At last he reached his climax: "Gentlemen of the jury," he said in a low, deep, impressive and most solemn voice, "the Scriptures tell us that Pontius Pilate wrote on the outward and invulnerable wall of mighty Nineveh these terrible and tragic words, Mene, mene, tekel, upharsin, which, being interpreted, mean—." "The Scriptures," the judge snapped in angrily, "don't tell us that Pontius Pilate wrote any such words on any wall anywhere." Counsel stared for a moment at the judge, indignant and amazed. Then he replied with great dignity, "My lord, the Scriptures certainly tell us that somebody wrote these words on some wall somewhere; and whoever the writer, and wherever the wall, the principle is the same."

* * *

The *Oxford Magazine* for December 6th contains the following letter received by a firm in London from one of its correspondents in a distant land:

"Regarding the matter of escaping penalty your non-delivery of the aircraft, there is a way to creep round same by diplomat

and we must make a statement of strike occur our Factory (of course big untrue). Please address my firm on enclosed form of letter and believe this will avoid penalty of case. As Mr. Z. is most religious and competent man and also heavily upright and godly, it fears me that useless apply for his signature. Please attach same by office making forge, but no cause to fear of prison happening as this is often operated by other merchants of highest integrity. It is highest unfortunate Mr. Z. so godlike and excessive awkward for business purposes. I think much better add little serpentlike wisdom to upright manhood and thus found a good business edifice."

ARTICLES AWAITING PUBLICATION.

Two Experiments with a Single Chamber Legislature, by Honble. Senator W. B. Ross, K.C.

"Arising out of and in Course of Employment," by Geo. A. Kingston, Commissioner Ontario Workmen's Compensation Board.

Uniformity of Canadian Company Law: Being the minority report of the Canadian Bar Association.

The Companies Act with Special Reference to the Bonanza Case, by Thos. Mulvey, K.C., Under-Secretary of State for Canada.

Legal Fictions: I. The Appeal to Cæsar; II. The Fool's Paradise, by M. L. Hayward, Hartland, N.B.

The Homestead and Exempted Property in Saskatchewan: Creditors' Rights, by Bram Thompson, M.A., Regina, Sask.

A Famous Lord Chancellor of the Golden Age of Equity, by Silas Alward, K.C.

OUR LONDON LETTER.

44 BEDFORD ROW, LONDON, W.C. 1.
NOVEMBER 6TH, 1918.

The Editor,
"The Canadian Law Times,"
Toronto, Canada.

Sir,—The appointment of Lord Justice Pickford as President of the Probate, Divorce and Admiralty Division in succession to the late Sir Samuel Evans has been received with general satisfaction. Well versed in mercantile and admiralty law, and possessing to a marked degree dignity, courtesy and learning, Sir William Pickford should more than justify his appointment. The new President, who is 69 years of age, practised locally at Liverpool during the greater part of his career as a junior. He took silk in 1893, and in 1907 was appointed a Judge of the King's Bench Division. In 1914, on the resignation of Sir R. Vaughan-Williams, he became a Lord Justice of Appeal, and is the first holder of that office to become President of the Probate, Divorce and Admiralty Division.

Sir Ralph Neville, the senior Judge of the Chancery Division of the High Court of Justice, died on October 13th, aged 70. Both in his own Court and in the Court of Appeal, where he occasionally sat as a temporary member, he proved an excellent Judge, and completely fulfilled the promise he had shown at the Bar. Quick at grasping the facts and bearings of a case, he was always courteous and kindly to those who practised before him. He took silk in 1888, and in 1906 was appointed a Judge of the Chancery Division. One of his most famous judgments was given in the *Osborne Case* where he held that a rule of a trade union authorising the application of union funds in payment of labour members of Parliament was *ultra vires,* which was reversed by the Court of Appeal.

Sir Edward Fry, one of the grand old men of the law and one of the greatest equity judges of his generation, died on October 18th, in his ninety-first year. A member of the famous Quaker family, Sir Edward Fry was born in Bristol in 1827. He was called to the Bar in 1854, and in 1869 took "silk" and became a Bencher of Lincoln's Inn. In 1877 he was appointed a Judge of the Chancery Division, and in 1883 became a Lord Justice of Appeal. After his retirement from the Bench in 1892, Sir Edward performed many public services, and acquired the popular title of the "Great Arbitrator." Thus in 1902, he was Arbitrator between the United States of America and Mexico in the Pious Funds Case, and in 1909, he was Arbitrator between France and Germany in the Casa Bianca incident. Apart from his work on the Bench, he is best known to the profession by his standard treatise on "*Specific Performance.*"

There has been no more startling instance of the wonderful change which the war has wrought in our whole outlook upon politics than the debate and division in the House of Commons on the 23rd ult. on the motion by Mr. Herbert Samuel that in the opinion of the House it was desirable that a Bill should be passed forthwith making women eligible as members of Parliament. The motion, which was supported by members of all parties, was carried by a majority of 249, 274 members voting in its favour and 25 only voting against it. It is easy to say that to grant to women the right to sit in Parliament, if they can get elected, is the logical and necessary sequel to granting them the right to vote, and it is possible to say that it is a much less grave change to allow a few women members to sit in the House of Commons than to allow several millions of women to decide by their votes who shall sit in the House of Commons. It is, perhaps, not a very great matter that a few women members should sit with their brother members at Westminster; but it is certainly a most momentous change that a woman's

right to an equal place with man in the counsels of the nation should be thus practically recognized. A Bill to give effect to the resolution has been introduced by Lord Robert Cecil. Its one and only clause reads: 'A woman shall not be disqualified by sex or marriage from being elected to sit, sitting or voting, as a member in the Commons House of Parliament.'

There has just been presented to Parliament a bulky volume containing a selection from the resolutions passed by the Imperial War Conference in June and July last, extracts from the minutes of proceedings, and a series of memoranda submitted to the Conference on various topics which came under discussion. Necessarily, the document covers only part of the ground, since a large portion of the proceedings was of a highly confidential character, while other parts, although not essentially confidential, are unsuitable for publication at the present juncture. Such of the findings and discussions as are disclosed, however, are of considerable interest and importance, and sufficiently demonstrate the need for, and the value of, these periodical consultations of representative Empire statesmen.

In an earlier letter I indicated some of the principal topics dealt with at the Conference, but it will doubtless be of interest if I deal with the essential features of some of the main proposals in somewhat greater detail.

(1) *Demobilization:* The Conference agreed that an advisory and executive committee—to be known as the "Military Demobilization Committee of the British Empire"—should be set up forthwith:

> (*a*) To consist of representatives of the military authorities of the Dominions and Colonies, and of representatives of the War Office, India Office, and Ministry of Shipping, under the Chairmanship of the Secretary of State for War, or someone deputed by him; the secretariat of the

committee to be provided by the Mobilization Directorate of the War Office.

(*b*) To consider all military questions of demobilization affecting the various Governments concerned by: (1) Making decisions in regard to matters of detail; (2) submitting questions of principle which may arise from time to time to the Government or Governments concerned; (3) Arranging for the fullest exchange of information with regard to plans for demobilization;

(c) To sit, prior to general demobilization, at such time as may be considered necessary by the chairman; during demobilization, as frequently as may be necessary to secure the complete mutual co-ordination of the demobilization procedure of the various Governments concerned.

(2) *Control of Raw Materials*: The Conference agreed that it was necessary to secure for the British Empire and the belligerent Allies the command of certain essential raw materials in order to enable them to repair the effects of the war as soon as possible and to safeguard their industrial requirements, and further expressed the opinion that the Governments of the Empire should make such arrangements amongst themselves as would ensure that essential raw materials produced within the Empire would be available for the above purposes, and should arrange with the Allied countries to utilise for the same purposes essential raw materials produced in those countries. To assist the Governments in determining their action in this respect, the Conference recommended: (1) That a committee of its members should first consider the possible methods in each part of the Empire of obtaining command of each of the essential raw materials; (2) That the Governments represented at the Conference should, in the light of the information collected by their representatives on the committee, consult with the representatives of the producers and trades concerned as to the method of obtaining com-

mand best suited to each individual commodity. The Conference further recommended the Governments of the Empire to consider immediately what steps could be taken to co-operate with the efforts of the Imperial Government to promote the successful development of the dye industry in the British Empire, and so to avoid enemy domination over our essential industries. A resolution was also passed commending to the attention of the various Governments a memorandum submitted to the Conference on the growing importance for naval, military and industrial use of maintaining and increasing the supply of petroleum.

(3) *Shipping and Cable Communications*: In order to maintain satisfactorily the connections, and at the same time encourage commercial and industrial relations between the different countries of the Empire, the Conference was of opinion that shipping on the principal routes, especially between the heart of the Empire and the Oversea Dominions, including India, should be brought under review by an Inter-Imperial Board on which the United Kingdom and the British Dominions and Dependencies should be represented. For this purpose an Imperial Investigation Board, representing the various parts of the Empire, should be appointed, with power to inquire into and report on all matters connected with ocean freights and facilities, and on all matters connected with the development and improvement of the sea communications between the different parts of the Empire, with special reference to the size and type of ships, and the capacities of harbours; the Board to include, in addition to representatives of the Governments concerned, persons with expert knowledge of the problems involved, including representatives of the shipping and trading interests.

It was the opinion of the Conference that it is in the highest interests of the Empire that the rates for telegraphic communications between the United Kingdom, Canada, Australia, South Africa and India, should be further materially reduced as soon as prac-

ticable, and that in order to secure generally the cheapest and most secure telegraphic communication between the United Kingdom, Canada, Australia and New Zealand it is desirable that they should co-operate in the provision of a State-owned cable across the Atlantic.

(4) *Inter-Imperial Parcels Delivery*: For the purpose of encouraging Imperial trade it was considered desirable that the present facilities for inter-Imperial parcels delivery should be enlarged, improved and co-ordinated, and it was recommended that proposals to this end submitted by the Board of Trade should be examined by the Governments represented at the Conference with the view to the preparation of a detailed scheme.

(5) *Empire News Service*: The Conference was impressed with the importance of securing (*a*) that an adequate news service should be available in all parts of the British Empire, and (*b*) that this service should be supplied through British sources. His Majesty's Government were therefore requested to formulate a scheme with these objects in view on the lines indicated in a memorandum prepared by the Minister of Information, and to submit it for the consideration of the Governments represented.

(6) *Emigration*: The Conference reaffirmed the principle in favour of arrangements being made by which intending emigrants from the United Kingdom might be induced to settle in countries under the British flag. It was of opinion that the representatives of the Oversea Dominions of the United Kingdom should keep in the closest touch with any new body established by His Majesty's Government to supervise emigration from the United Kingdom, and that the appointment of a Consultative Committee, not to exceed ten members, on which representatives of the Oversea Dominions should sit, to advise any such body, would afford the best means of co-operation.

(7) *Naturalization*: With regard to naturalization, the following resolution was passed by the majority of the Conference, the Canadian representatives abstaining from voting, and the South African representatives recording dissent:

> "This Conference is of opinion that legislation should be passed throughout the Empire restricting, for a period after the war, so far as in the circumstances of each country may be possible, the naturalization of citizens of present enemy countries, and also the acquisition by them of any form of political rights or of land or mining privileges."

In view of the importance of securing uniformity of policy and action throughout the Empire with regard to naturalization, it was recommended that a special Conference, representative of all parts of the Empire, should be held at the earliest practicable date to examine and report upon any question connected with nationality or naturalization which any Government represented at the special Conference might desire to raise, and upon any suggestions made for the amendment of the existing law.

(8) *Channels of Communication*: The Report contains full details of the discussion at the Conference on the proposal that the development which has taken place in the relations between the United Kingdom and the Dominions necessitates such a change in the administrative arrangements and in the channels of communication between the Governments of the Dominions and the Government of the United Kingdom as will bring them more directly into touch with each other. The Conference commended the subject to the "immediate consideration" of the Imperial War Cabinet. The result was that on July 30th the Imperial War Cabinet passed the resolutions which were published at the time in favour of direct communication between the Dominion Prime Ministers and the Prime Minister of the United Kingdom, and of the nomination by each Dominion Prime Minister of a member of his Cabinet, 'either as a resident or visitor in London, to represent him at meetings of the Imperial War

Cabinet to be held regularly between the plenary sessions.'

Before the War it was established that the Imperial Conference is a Conference of Governments, of which the Prime Minister of the United Kingdom is *ex officio* President, as *primus inter pares*, and the Dominion Prime Ministers represent their respective Governments. But in the intervals between the Conferences, when the Dominion Prime Ministers had returned to their homes, communications reverted to their traditional channels, through the medium of the Colonial Office, the only medium hitherto recognized for the exchange of correspondence between the British Government and the Dominions. To meet the stress and necessities of war, however, there has emerged the great fact of the Imperial War Cabinet, the initiation of which by the Prime Minister of the United Kingdom in December, 1916, was a very important development in the relations between the Mother Country and the Dominions. This Cabinet is, in reality, as Sir Robert Borden pointed out at the Conference, a Cabinet of Governments, and its creation corresponds to the increasing consciousness of nationhood which is growing up in all the Dominions of the Empire. What has been achieved by the creation of the Imperial War Cabinet is recognition of equality of status as between the various States which form the British Commonwealth. The Dominions, no longer infant settlements, but grown sister-nations, are taking their full share and full responsibility in the waging of the war. The Prime Minister of the Mother County sits in council with the Dominion Prime Ministers, first among his peers. In the Imperial War Cabinet all intermediaries have been swept away, and Government meets Government face to face.

It is obvious that these outstanding facts represent a development of the Imperial relations to which the old formulas of administration and the old methods of

correspondence are no longer applicable, and that new formulas and new methods must be developed to bring the machinery of Government into harmony with the realities.

The system of administration through the Colonial Office has, by the unanswerable logic of events, become an anachronism. A system which was developed long ago to meet the circumstances of Crown Colonies, and which has since been patched and revised from time to time to conform to the early stages of Colonial responsible Government, is quite inapplicable to the self-governing Dominions of to-day. As the Prime Minister of Australia (Mr. W. M. Hughes) said:—

> "The old machine is past repair, and must be replaced by a new one, founded on recognition of the fundamental fact that the Dominions are nations and that their relations with each other, and with the Mother-country, intimate though they are, rest upon the complete autonomy of the several parts."

The Governments of the Dominions must be brought into direct relation with the head of the British Government. There should be a reorganization of the whole Imperial machine, so that Dominion correspondence goes direct, so far as official form is concerned, to the Prime Minister. It would seem to follow that Dominion Governors-Generals should be appointed by, and be responsible to, the Prime Minister.

The change in the system of communication between the Dominion Prime Ministers and the Prime Minister of the United Kingdom contemplates continuing the War Cabinet even when the war has come to an end—under another name of course, for it will then be the Imperial Cabinet—for as the Prime Minister of New Zealand (Mr. Massey) pointed out, the Dominions will never be satisfied to go back to the system which obtained before the war, in which they had practically no voice in Imperial affairs. The new system of administration is probably another step in the natural development of the Imperial constitution

which under our very elastic system may be modified from time to time to meet the exigencies of the situation. It should be mentioned that the Dominion Prime Ministers emphasised the fact that the proposal implied no want of confidence in the Colonial Office or any want of satisfaction with the work it has done in the past.

(9) *Imperial Court of Appeal*: The Conference spent much time discussing the advisability of replacing the present dual system of appeal by the consitution of an Imperial Court of Appeal, and passed the resolution set out in my *London Letter* in the September number of the *Canadian Law Times*. Although the members of the Conference favoured the proposal to constitute such a Court, the majority of them were impressed with the practical difficulties of carrying such proposal into effect. In Mr. Hughes' opinion the existence side by side of two supreme tribunals of appeal—the House of Lords for appellants in the United Kingdom, and the Judicial Committee of the Privy Council for appellants resident in other parts of the Empire—is not compatible with the idea of Imperial Unity. In his view there should be one final Court of Appeal for the whole Empire—a Court in which Dominion as well as British Judges are not only qualified, but available to sit, and to which appellants from all parts of the Empire should have recourse. Sir Robert Borden expressed the opinion (in which Mr. Rowell concurred), that the decisions of the Privy Council command the confidence of the Canadian people and of the Canadian Bar, and that although there have been critics from time to time there has not been in Canada any general dissatisfaction with the judgments of the Privy Council. Mr. Lloyd (the Prime Minister of Newfoundland) stated that in Newfoundland every confidence was felt in the decisions of the Privy Council, while Mr. Massey stated that, as far as New Zealand was concerned, he knew of no agitation or demand for reform. Sir J. P. Sinha,

speaking for India. which supplies nearly two-thirds of the business, stated that the Privy Council has throughout commanded the entire confidence of litigants in India.

(10) *Miscellaneous*: Further progress was made towards a settlement of the controversy between India and the Dominions as to the immigration of Indians and their status in those countries, and resolutions were passed recommending the establishment of an Imperial Bureau of Mycology, and the holding of a conference to consider the setting up of an Imperial Statistical Bureau.

W. E. WILKINSON.

CONSOLIDATION AND TACKING.(a)

By John Delatre Falconbridge, M.A., LL.B.

1. The doctrine of consolidation.
2. The mortgages must be overdue.
3. Effect of transfer of the equities or of the mortgages.
4. Case of different mortgages to one mortgagee.
5. Case of mortgages to different mortgagees.
6. Consolidation under the Registry Act.
7. The doctrine of tacking and the Registry Act.
8. So-called tacking to avoid circuity of action.

1. *The doctrine of consolidation.* — A mortgagee who holds two or more distinct mortgages upon different parcels of land made by the same mortgagor, if the mortgages are no longer redeemable at law but are redeemable only in equity, may, within certain limits, and against certain persons, "consolidate" them, that is, treat them as one, and decline to be redeemed as to any unless he is redeemed as to both or all (*b*). This doctrine of consolidation was formulated (*c*) in *Shuttleworth* v. *Laycock* (*d*) in 1684 and in *Pope* v. *Onslow* (*e*) in 1692. The doctrine in its simplest and probably its original form is that if a person has mortgaged two separate parcels of land to one mortgagee to secure two different debts, and has made default as to both mortgages so that his estates have become

(*a*) This forms a portion of a forthcoming work by Mr. Falconbridge upon *The Law of Mortgages*. It is expected to appear this month.—Ed. C. L. T.

(*b*) *Cf. Jennings* v. *Jordan* (1881), 6 App. Cas. 698, at p. 700.

(*c*) By Lord Keeper Bridgman. See also the case of *Bovey* v. *Shipwith* (1671), 1 Cas. in Ch. 201, *infra* 7, involving both consolidation and tacking. The doctrine of tacking (*infra*, 7) was formulated by Chief Baron Hale, Lord Keeper Bridgman and Baron Rainsford in *Hedworth* v. *Primate* (1662), Hardres 318, and *March* v *Lee* (1670), 2 Ventr. 337, 18 R. C. 523. It is worthy of note that these two doctrines which, in the opinion of modern legislators, shew an almost excessive respect for legal rules, were founded by judges who, though they were sitting in equity tribunals, were in fact rather common lawyers than equity judges. *Cf.* Jenks, *Short History of English Law*, pp. 220. 221.

(*d*) 1 Vern. 244.

(*e*) 2 Vern. 286.

forfeited at law, the debtor is not personally permitted to insist upon paying one debt and redeeming one mortgage without paying the other debt also (e^2).

Consolidation is founded on the equitable maxim that *he who seeks equity must do equity.*

> " The whole doctrine of consolidation, whatever may have been the particular circumstances under which it has been applied to different cases, arises from the power of the court of equity to put its own price upon its own interference as a matter of equitable consideration in favour of any suitor. At law, independently of a legal estate, when the power of redemption given by original contract is gone, then a person comes into equity to have assistance from the courts of equity and asks to redeem upon what are called equitable considerations, and then the court of equity says:—'This is the price upon which we give you the relief you seek, namely, on your paying all that is due.'" (f)

The right of consolidation belongs to the mortgagee, not to the mortgagor. The latter cannot compel the former to consolidate (g). It may be asserted by the mortgagee not only in a redemption action, but also in a foreclosure action. The latter is merely an action brought for the purpose of compelling the mortgagor to redeem within a limited time and of depriving him of his equity of redemption if he does not redeem within such time, and the redemption if it takes place in a foreclosure action is subject to the same equitable conditions as if it took place in a redemption action (h).

The right to consolidate, unlike the right to tack, does not depend upon the possession of the legal estate and the right may exist although the securities com-

(e^2) *Pledge* v. *White*, [1896] A. C. 187, at pp. 192 ff., 18 R. C. 264, at pp. 269 ff., where the extension of the doctrine to transferees of the mortgages and to assignees of the equity of redemption is discussed.

(f) *Cummins* v. *Fletcher* (1889), 14 Ch. D. 699, at p. 708.

(g) *Pelly* v. *Wathen* (1851), 1 DeG. M. & G. 16.

(h) *Cummins* v. *Fletcher* (1880), 14 Ch. D. 699, at p. 708; *Johnston* v. *Reid* (1881), 29 Gr. 293; *Silverthorn* v. *Glasebrook* (1899), 30 O. R. 408. The right to consolidate may be asserted by the mortgagee in the master's office on a reference in a foreclosure action. *Ross* v. *Stevenson* (1877), 7 O. P. R. 126; *Merritt* v. *Stephenson* (1858), 7 Gr. 22. The right may be asserted although the mortgagee has already given notice requiring the mortgagor to pay one of the mortgages. *Griffith* v. *Pound* (1890), 45 Ch. D. 553.

prise properties of different natures (*i*). A mortgage of real estate can be consolidated with a mortgage of personal estate (*j*), and a legal mortgage can be consolidated with an equitable mortgage (*k*), and an equitable mortgage with another equitable mortgage (*l*).

2. *The mortgages must be overdue.*—The right of consolidation exists only as to mortgages with respect to which the mortgagor has made default and has consequently lost his legal or contractual right to redeem, so that he is compelled to ask for equitable relief. If default has been made on two mortgages from the same mortgagor, and the mortgagee sells under the power of sale in one of the mortgages and realizes a surplus, he may consolidate the mortgages and apply the surplus on account of the other mortgage, even as against the assignee in bankruptcy of the mortgagor (*m*). But if the mortgaged property is insured in the name of the mortgagor with loss, if any, payable to the mortgagee as his interest may appear, and a loss occur, the surplus insurance money, after payment of the mortgagee's claim, belongs by law to the mortgagor by virtue of his contract with the insurer, and therefore the doctrine of consolidation does not apply so as to enable the mortgagee to apply the surplus upon another mortgage held by him from the same mortgagor (*n*).

It has been held that the default under the mortgages sought to be consolidated must be a continuing

(*i*) *Neve* v. *Pennell, Hunt* v. *Neve* (1863), 2 Hem. & M. 170, at p. 183; 21 Halsbury, *Laws of England.* 210; *Silverthorn* v. *Glazebrook. supra.*

(*j*) *Tassel* v. *Smith* (1858), 2 DeG. & J. 713.

(*k*) *Watts* v. *Symes* (1851), 1 DeG. M. & G. 240.

(*l*) *Tweedale* v. *Tweedale* (1857), 23 Beav. 341.

(*m*) *Selby* v. *Pomfret* (1861), 3 DeG. F. & J. 595. In this case the Lord Chancellor incorrectly uses the work "tack" in the sense of "consolidate." *Pledge* v. *White,* [1896] A. C. 187, at p. 197, 18 R. C. 264, at p. 274.

(*n*) *Re Union Assurance Company* (1893), 23 O. R. 627. The result would have been different if the insurance contract had been made between the mortgagee and the insurer, because in that case the mortgagor's claim to the surplus, if any, would have been virtually that of a *cestui que trust* as in *Selby* v. *Pomfret, supra.*

default at the time when an action is brought in which the right of consolidation might be asserted, so that if a mortgagor, before action brought, pays or tenders the whole amount due on one mortgage, he is entitled to a discharge and the mortgagee has no right to consolidate that mortgage with other mortgages with respect to which the same mortgagor is in default (*o*). It would seem to follow that if there is no acceleration clause and the mortgagor is in default only as to certain instalments of principal or interest, he may avoid the doctrine of consolidation by paying the arrears before action brought. If there is an acceleration clause in the form given in the schedule to the Short Forms of Mortgages Act and the whole principal has become due by virtue thereof, the result would be the same (*p*).

3. *Effect of transfer of the equities or of the mortgages.*—The doctrine of consolidation does not apply unless the mortgages sought to be consolidated were all or both made by the same mortgagor (*q*) in the same right (*r*), and it is not sufficient that the equities of redemption are subsequently united in the same person (*s*). On the other hand it is not necessary that the

(*o*) *Scottish American Investment Co.* v. *Tennant* (1890), 19 O. R. 263. This decision seems to be incorrect on principle, because the mortgagor, having made default, had lost his legal right to redeem, and should not have been allowed to redeem in equity except on equitable terms.

(*p*) Even after action brought the mortgagor, subject to rules of Court, might pay the arrears and costs and be relieved from the consequences of his default. In that event, as the mortgagor's legal rights would be restored by virtue of the statute, there would be no right to consolidation on the mortgagee's part. *Cf. Todd* v. *Linklater* (1901), 1 O. L. R. 103. A special acceleration clause, not operating under the statute, and not containing any provision relieving the mortgagor from the consequences of default, would have the effect of compelling the mortgagor to pay off the whole mortgage in order to avoid consolidation.

(*q*) A mortgage made by A. cannot be consolidated with a mortgage made by B. to the same mortgagee even though B. is merely a trustee for A. *Sharp* v. *Rickards*, [1909] 1 Ch. 109.

(*r*) A mortgage made by a partner for his own private debt cannot be consolidated with a mortgage made by two or more partners for a partnership debt. *Cummins* v. *Fletcher* (1880), 14 Ch. D. 699, at p. 710.

(*s*) *Sharp* v. *Rickards*, *supra*.

mortgages should originally have been made to the same mortgagee; it is sufficient in certain circumstances that they should be held by the same person when the doctrine is invoked.

The cases are divisible into classes which will be discussed separately (*t*).

4. *Case of different mortgages to one mortgagee.*— The simpler case is that of two mortgages of different parcels of land made by one mortgagor to one mortgagee.

The right to consolidate is lost if the two mortgages originally held by one person are assigned to different persons or if one of the mortgages has ceased to exist (*u*).

(1) The mortgagee may consolidate as against the original mortgagor who remains the owner of the equity of redemption in both parcels.

(2) The mortgagee may consolidate as against any person who becomes the owner of the equity of redemption of either parcel subsequently to the making of the two mortgages, the assignee in such case taking subject to the equities affecting the land, including the consummate or inchoate right of consolidation (*v*). Thus the mortgagee may consolidate as against the heir of the mortgagor (*w*), or his assignee in bank-

(*t*) See 4 and 5, *infra*. The examples stated are those of two mortgages only, but the same principle would apply in the case of three or more mortgages. In each case it is assumed that the conditions already discussed are fulfilled, that is, that in respect of all or both the mortgages the contractual right to redeem is gone and that the person seeking to redeem has merely an equity of redemption. The cases are first stated without reference to the Registry Act, and the qualifications effected by that Act are discussed separately.

(*u*) *In re Raggett, Ex parte Williams* (1880), 16 Ch. D. 117.

(*v*) A mortgagee cannot, as against the assignee of the equity of redemption of one parcel, consolidate with his original mortgage a mortgage on another parcel created by the same mortgagor after the assignment of the equity of redemption. *Jennings* v. *Jordan* (1881). 6 App. Cas. 698; *Pledge* v. *White*, [1896] A. C. 187, at p. 196, 18 R. C. 264, at pp. 272-3; *Cf. Harter* v. *Colman* (1882), 19 Ch. D. 630. The subsequent act of the mortgagor cannot prejudice the earlier assignee of the equity of redemption.

(*w*) *Margrave* v. *Le Hooke* (1690) 2 Vern. 207.

ruptcy (*x*), or as against a puisne mortgagee or purchaser of one of the parcels (*y*).

5. *Case of mortgages to different mortgagees.*—The more complex case is that of two mortgages made by one mortgagor of different parcels of land to different mortgagees, where the two mortgages subsequently become vested in the same person, whether he be one of the original mortgagees or a third person who takes a transfer of both mortgages.

(1) The holder of the two mortgages may consolidate as against the mortgagor if the latter remains the owner of the equity of redemption of both parcels when the mortgages become vested in the same person. Any subsequent dealings with either parcel are subject to the right of consolidation.

(2) The holder of the two mortgages may consolidate as against a person to whom the equity of redemption of both parcels is transferred by the same deed or as part of the same transaction, if such transferee remains the owner of the equity of redemption of both parcels when the mortgages become vested in the same person. The transferee in such case simply stands in the shoes of the mortgagor, subject to the same equitable right of consolidation in the event of the subsequent union of the two mortgages in the hands of one holder (*z*).

(*x*) *Pope* v. *Onslow* (1692), 2 Vern. 286. This point was doubted by Lord Hardwicke. *Ex parte King* (1750), 1 Atk. 300; Ashburner, Equity. 302.

(*y*) *Ex parte Carter* (1773), Amb. 733; *Watt* v. *Symes* (1851), 1 DeG. M. & G. 240, at p. 245. This was doubted by Lord Northington in *Willie* v. *Lugg* (1761), 2 Ed. 78; Ashburner, Equity, 302.

(*z*) It is true that in such case the result is that the assignee of the equity of redemption is held to take subject to a mere possibility of an equity, whereas the general rule, which governs the case next discussed, is that the assignee takes subject only to an equity existing at the time of the assignment. The special rule applicable to the assignment of the equity of redemption of both properties has however been established since the decision in *Vint* v. *Paget*, 1858, 2 DeG. & J. 611, which was followed in *Pledge* v. *White*, [1896] A. C. 187, 18 R. C. 265. Cf. *Selby* v. *Pomfret* (1861), 3 DeG. F. & J. 595, in which a mortgagee of one parcel with notice of the mortgagor's bankruptcy purchased a mortgage of another parcel made by the same mortgagor and was held entitled to consolidate as against the trustee in bankruptcy.

(3) The holder of the two mortgages may consolidate as against different transferees of the equities if the union of the two mortgages in one hand takes place before the severance of the equities has been effected by the transfer of either of the equities. If either of the equities is transferred before the union of the mortgages, the transferee of the equity takes free from the right of consolidation (*a*).

6. *Consolidation under the Registry Act.*—In England by the Conveyancing Act, 1881, s. 17, the doctrine of consolidation is excluded as to mortgages made on or after the first day of January, 1882, if and so far as a contrary intention is not expressed in the mortgage deeds or one of them (*b*).

In Ontario the propositions already stated must be qualified in consequence of the Registry Act. The right of consolidation being merely an equitable right it is subject to be defeated by the provision of s. 73 that "no equitable lien, charge or interest affecting land shall be valid, as against a registered instrument executed by the same person, his heirs or assigns."(*c*) The right of consolidation cannot therefore be asserted as against the assignee for value (*d*) of the equity of redemption of one parcel who takes without notice of the existence of the mortgage made by the same mortgagor and held by the same mortgagee upon another

(*a*) Because the right of consolidation at the time of the transfer is a mere possibility, not an existing equity, either consummate or inchoate. *Harter* v. *Colman* (1882). 19 Ch. D. 630; *Minter* v. *Carr*, [1894] 3 Ch. 498; *Fraser* v. *Nagle* (1888), 16 O. R. 241; *Hughes* v. *Britannia Permanent Benefit Building Society*. [1906] 2 Ch. 607; *Cf. Mills* v. *Jennings*.

(*b*) *Bird* v. *Wenn* (1886), 33 Ch. D. 215; *Farmer* v. *Pitt*, [1902] 1 Ch. 954.

(*c*) See article on *Registration and its Effect* in 38 C. L. T. 481, at p. 488 (July, 1918).

(*d*) *Johnston* v. *Reid* (1881), 29 Gr. 293. In this case an execution creditor obtained a second mortgage of one parcel in consideration of time being given for payment and registered his mortgage. As against him it was held that a prior mortgagee of both parcels could not consolidate, although if the second mortgage had not been given and registered. the mortgagee might have consolidated as against a mere execution creditor.

parcel and whose assignment is duly registered (*e*). On the other hand if the two mortgages are registered and a person subsequently takes a conveyance or mortgage of both parcels, his search in the registry office will disclose the fact that both parcels are subject to mortgages made by the same mortgagor and held by the same mortgagee and the purchaser or mortgagee of the two equities will therefore take with notice of and subject to the right of consolidation (*f*).

7. *The doctrine of tacking and the Registry Act.*— The doctrine of consolidation is not affected by the provision of s. 73 of the Registry Act that "tacking shall not be allowed in any case to prevail against the provisions of this Act"(*g*). Even as to tacking the provision in question is unnecessary and therefore inoperative. No doctrine legal or equitable can "prevail against," that is, override, a statute passed by competent authority containing provisions which are inconsistent with the doctrine, and, as will be seen presently, the fact that successive mortgages are registered will usually exclude the doctrine of tacking. In any event the provision as to tacking has no application to the doctrine of consolidation. Tacking and consolidation are quite distinct and depend upon different principles, although the terms have sometimes been confused in the cases.

Consolidation is a doctrine relating to equity of redemption. It is an illustration of the maxim that *he who seeks equity must do equity*, and arises where two or more mortgages are made by the same mortgagor on different properties and held by the same mortgagee or assignee.

(*e*) *Brower* v. *Canada Permanent Building Association* (1877), 24 Gr. 509; *Miller* v. *Brown* (1883), 3 O. R. 210. It is assumed, of course, that there is nothing on the abstract of title of the parcel purchased to disclose the existence of the mortgage on the other parcel.

(*f*) *Dominion Savings and Investment Society* v. *Kittridge* (1876). 23 Gr. 631, at p. 635. As to the effect of registration as notice, see 38 C. L. T. 485, at p. 485.

(*g*) *Dominion Savings and Investment Society* v. *Kittridge* (1876), 23 Gr. 631.

Tacking properly so-called is a doctrine relating to priorities between competing mortgagees of the same property (*h*). It is an illustration of the maxim that *where the equities are equal, the law shall prevail,* and arises where a third mortgage is taken without notice of the second. If the third mortgagee gets in the legal estate by purchasing the first mortgage, he is allowed to "tack" the third mortgage to the first mortgage, and obtains priority as to both over the second mortgage. The doctrine is the logical result of the priority *prima facie* accompanying the possession of the legal estate. The first mortgage is of course entitled to priority, and the legal estate of the mortgagee combined with the fact that he took the third mortgage for value in good faith and without notice gives him priority as to that mortgage also over the equitable interest of the second mortgagee (*i*).

It is essential that the person who seeks to gain priority over a second mortgage by virtue of the doctrine of tacking should have taken the third mortgage without notice of the second mortgage. (*j*). If he takes

(*h*) The very early case of *Bovey* v. *Skipwith* (1671), 1 Cas. in Ch. 201, in the reign of Charles II., affords an illustration of consolidation and of tacking. There was (1) a mortgage (apparently) with conveyance of the legal estate of two properties; (2) an assignment of the equity of redemption of the two properties to a second mortgagee; (3) a third mortgage of one of the properties only without notice of the second mortgage. The third mortgagee bought and took a transfer of the first legal mortgage. It was held, first, that he might tack his equitable third mortgage to the first mortgage, so as to gain priority over the second mortgage, and, secondly, that having done so he might consolidate his third mortgage on one property with the first mortgage on both properties and hold the two properties as against the second mortgagee until all that was due to him on both securities should be satisfied. *Pledge* v. *White*, [1896] A. C. 187, at pp. 193-194, 18 R. C. 264, at pp. 270-271.

(*i*) The equitable rules as to priorities between legal and equitable mortgages respectively are discussed in chapter 7, and in section 68 the doctrine of tacking is stated as one of the phases of the wider doctrine of purchase for value without notice. The unfortunate second mortgagee who loses his priority as a result of the doctrine of tacking receives at least some words of sympathy in *Federal Life Assurance Co.* v. *Stinson* (1906), 13 O. L. R. 127, at p. 141, S. C. *sub nom. Scott* v. *Swanson* (1907), 38 Can. S. C. R. 229.

(*j*). (*k*) See 38 C. L. T. at p. 482.

THE SALARIES OF SUPERIOR COURT JUDGES IN MANITOBA AND OTHER WESTERN PROVINCES.

Why should Superior Court judges of original jurisdiction in Western Canada receive $1,000 a year less than Court of Appeal judges when no such difference in salary is made in Ontario and Quebec?

Why should not the Chief Justices receive $8,000 and the puisne judges $7,000 each whether of original or appellate jurisdiction?

The salaries of the judges of the Superior Courts are as follows:—

British Columbia—

The Chief Justice of the Court of Appeal		$8,000
Four Justices of Appeal, each	$7,000	
The Chief Justice of the Supreme Court		7,000
Five puisne judges of that Court, each	6,000	

3 & 4 Geo. V., c. 28, s. 3 (1913).

Alberta—

The Chief Justice of the Supreme Court		$7,000
Eight puisne judges, each	$6,000	

4 & 5 Geo. V., c. 38, s. 2 (1914).

Saskatchewan—

The Chief Justice of the Court of Appeal		$8,000
Three puisne judges of the Court of Appeal	$7,000	
The Chief Justice of the Court of King's Bench		7,000
Five puisne judges of that Court	6,000	

6 & 7 Geo. V., c. 25, s. 1 (1916).

Manitoba—

The Chief Justice of the Court of Appeal		$8,000
Four puisne judges of that Court.	$7,000	
The Chief Justice of the Court of King's Bench		7,000
Five puisne judges of that Court, each	6,000	

2 Geo. V., c. 29, s. 4 (1912).

Ontario—

The Chief Justice of Ontario and		$8,000
Four Justices of Appeal, each	$7,000	
The Chief Justice of the King's Bench, of the Common Pleas and of the Exchequer, each		8,000
Eleven puisne judges of the High Court, each	7,000	

$1,000 From Province.

Since 1869 the Provincial Government of Ontario has made an additional allowance to the judges of its Superior Courts. See 10 Ed. VII., c. 29, s. 2 (1910), which is as follows:

'2. Every judge of the Supreme Court shall be paid out of the Consolidated Revenue Fund the annual sum of one thousand dollars, payable quarterly, as compensation for the service which he is called on to render by any provincial legislation in addition to his ordinary duties.'

For the history of the provincial allowance: See Lefroy, *Canada's Federal System*, 533; Hodgins, Dominion and Provincial Legislation, at pp. 93 and 1114; R. S. O. 1877, c. 25, s. 3; R. S. O. 1887, c. 27, s. 3; R. S. O. 1897, c. 31, s. 3, and c. 52; preamble, and s. 1; R. S. O. 1914, c. 57, s. 1.

Quebec—

The Chief Justice of the King's Bench		$8,000
Five puisne judges, each	$7,000	
The Chief Justice of the Superior Court		8,000
Twenty-six puisne judges, each	7,000	
Fifteen other puisne judges (residing in small towns and country places), each	5,000	

4 & 5 Geo. V., c. 38, s. 1.

In 1906, upon motion to provide the salaries for the Court of Appeal for Manitoba, the following discussion took place: See 1906 Hansard, Vol. III., p.. 5007 to 5012.

Mr. Monk—"What is the salary of the judges of the Court of King's Bench in Manitoba?"

Mr. Aylesworth—"The Chief Justice, $7,000; the puisne judges, $6,000 each."

Mr. Monk—"There will be the anomaly under this measure that the judges of the Court of King's Bench in Manitoba will receive less than the judges of the Court of Appeal, thus differing in this respect from Quebec and I think the other provinces. Has the Minister of Justice considered that this distinction will exist only in Manitoba? It seems to me that when we have increased the salaries of the judges of the other provinces we would have been justified in giving the judges of the Superior Court in Manitoba the same salary as judges of equal standing in other provinces, because I would think that the cost of living in Winnipeg and the expense devolving upon judges of the King's Bench are just as great as those which have been incurred by judges of the Superior Courts of the other provinces. *The Court of King's Bench is a very old tribunal and its judges are entitled to consideration.*"

Mr. Aylesworth—"Personally I would not be in the least degree averse to seeing the judges of the King's Bench in Manitoba get the same remuneration as is given by this Bill to the judges of the new Appellate Courts."

After referring to the general increase of the preceding year, the Minister of Justice again proceeded:

"It is not anomalous that the judge of the appellate tribunal should have slightly higher remuneration than the judges of the Court from which the appeal is taken. This is often desirable. In my own experience there have been occasions when it has been very much desired by the practitioners in Ontario that some member of the High Court of the province might have been *induced to*

accept a position in the Court of Appeal, but by reason of the fact that there was no difference in salary and that there were advantages connected with the position of judge of the High Court, it has on more than one occasion, according to rumour at any rate, been *impossible to induce any member of the High Court of the Province of Ontario to take a seat upon the Appeal Court Bench.* The proposition now before the House places the judges of the appellate tribunal of Manitoba upon the same footing as judges of the like tribunal in Ontario and Quebec. There is no doubt that the *cost of living in Winnipeg* is as great as in Toronto or Montreal; indeed it is generally supposed to be *more expensive to live in a western city*, and in all the circumstances of the case His Excellency has been advised to recommend these as proper salaries for the judges of the new Court of Appeal . . ."

Mr. Monk—"I find that the Chief Justices in the Courts of Ontario receive $8,000—the Chief Justice of the Court of Appeals, the Chief Justice of the King's Bench, the Chancellor, and Chief Justice of the Common Pleas Division, and the Chief Justice of the Exchequer Division. In the Province of Quebec, the Chief Justice of our highest Court receives $8,000 and the puisne judges $7,000 each. In the Superior Court we have two Chief Justices, the Chief Justice of the Court who receives $8,000, and a kind of second Chief Justice or senior judge, who receives $8,000, and 17 puisne judges, who receive $7,000 each. In this new Court of Appeals in the Province of Manitoba the Chief Justice is to receive $8,000 and the three puisne judges $7,000 each. The Chief Justice of the Court of King's Bench, I understand, receives $7,000 only, and the two puisne judges $6,000 each. I know that in the Maritime Provinces and in some other parts of the Dominion the salaries of the judges are not as high as they are in the provinces of Ontario and Quebec; but, *why is a distinction drawn between the Province of Manitoba and the Provinces of Ontario and Quebec when the conditions of existence are similar? It seems to me that the judges of Court of King's Bench in Manitoba ought to be placed on the same footing as the judges of similar Courts in Ontario and Quebec.* The Minister of Justice has said that their salaries were increased last year. That is possible, but at the moment, when we are called on to appoint judges of the new Court, it seems to me that equity requires us at the same time to readjust the salaries of the judges of the Court of King's Bench in that province. *No fault could be found with the Government if it did so.*"

SUMMARY.

Quebec—	
Each Chief Justice	$8,000
31 puisne judges, each	7,000
Ontario—	
Each Chief Justice receives from Dominion and Provincial Government	$9,000
Each judge	8,000

Manitoba, Saskatchewan, British Columbia—

Court of Appeal—	
Each Chief Justice	$8,000
Each puisne judge	7,000
Courts of original jurisdiction (formerly of both appellate and original jurisdiction)—	
Each Chief Justice	$7,000
Each puisne judge	6,000

Alberta—

(No Court of Appeal having been provided).	
The Chief Justice	$7,000
Each puisne judge	6,000

It is generally conceded that the cost of living is higher west of the Great Lakes.

Why are the judges of the Court of King's Bench in Manitoba, and of the Courts of like jurisdiction in Saskatchewan, Alberta and British Columbia, paid by the Government of Canada $1,000 less per annum than the judges of the Courts of like jurisdiction in in Quebec and Ontario?

Why is the salary of these judges not on an equality with the recently established courts of appeal?

As stated by Mr. Monk, equality had been recognized in Ontario and Quebec.

Since the discussion quoted from Hansard, Courts of Appeal have been constituted in British Columbia and Saskatchewan on the basis of inequality in salary, while in New Brunswick a Court of Appeal has been constituted on the basis of equality.

Why is it that east of the Great Lakes equality, and west of the Great Lakes inequality, is the rule in all provinces where a Court of Appeal exists?

From his remarks already quoted, it is evident that Sir Allen Aylesworth contemplated filling, from the Court of King's Bench, vacancies in the Court of Appeal; he was then Minister of Justice, and was speaking officially; he fixes a higher salary for the judges

of Appeal, not because they are entitled as such, but as an inducement to the judges of the King's Bench to accept appointments to the Court of Appeal.

This was the only reason advanced against Mr. Monk's suggestion of equality; it did not prevail when a Court of Appeal was constituted for New Brunswick, and has not prevailed in filling vacancies in the Courts of Appeal throughout Canada.

Does not the provision defeat the intention? Is it not so that when there are vacancies in the Court of Appeal the appointments are usually sought by men of influence from the outside, in some cases, unfortunately, by men not as well qualified as some of those already on the King's Bench? Do not these naturally prefer the more lucrative position and may not this tend toward the weakening instead of the strengthening of the western Courts? The chance of promotion seems to have been eliminated.

Since the Manitoba Court of Appeal was established there have been four vacancies filled. The first (in Mr. Aylesworth's time) was filled from the Court of King's Bench, but Mr. Aylesworth's principle has not since been recognized; it was abandoned and has been forgotten. The three last appointments have been from the Bar.

It is not even suggested that any one of these appointments was offered to a judge of the King's Bench.

The judges of the King's Bench of Manitoba have asked for $1,000 per annum increase, so as to place them on an equality with those of Ontario and Quebec of like jurisdiction, and with their own judges of Appeal.

Is there any ground for refusal?

It is submitted that there should be equality in salary for the reasons stated by Mr. Monk, and that the inequality applied to the western provinces is without justification.

WESTERN LAWYER.

LEGAL FICTIONS: II. THE LAW'S DELAY.

"He's bound and determined to see you—says he won't have any other lawyer in the city," declared the little jailor, as he selected a key and padded down the "electric corridor."

"What is he in for?" queried Fraser MacKenzie, wearily.

"Tried to rob the Regal Bank this afternoon, and shot and killed the teller."

"Was up in Court and never heard a word about it," remarked MacKenzie. "Pretty strong evidence, I suppose?" he asked absently.

"Couldn't be stronger," was the cheerful reply. "A cop saw him come out of the bank and nabbed him before he'd gone two blocks. Half a dozen of the clerks were up this afternoon and identified him."

"Not much show, apparently."

"Oh, he'll swing for it all right," answered the jailor with an air of professional pride, as he opened the heavy door.

MacKenzie entered the narrow cell and the door clanged behind him. The prisoner rose from the iron cot, and the lawyer's air of bored indifference vanished.

"Great God, it's Arthur Benson!" he exclaimed.

"Thought you'd be a bit surprised," leered the prisoner.

"What became of Alma?" snapped MacKenzie.

Benson did not reply. He glanced furtively at the barred window; and in the brief interval of silence the lawyer's alert mind flashed back to the unforgotten past. He saw himself in his room at Starvard Law School, the evening before graduation day, tearing open with trembling fingers a letter in Alma's familiar handwriting. The sentences stood out on the flickering mental film, vivid and clear cut.

"No, Fraser," it read, "I cannot marry you. Really I do not care in that way. I know you will be

disappointed and feel it very keenly for a time; but it will be unfair not to tell you. Besides, even if I cared for you enough, I would not dare marry you. You are so enthusiastic over your legal studies and so absorbed in your ambitions for the future, that in time the law would claim all your attention and your love for me would soon be a forgotten dream."

He tore the letter in fragments, cast them into the grate and flung himself into a chair in a frenzy of grief.

"She loves Benson, that's what's the trouble," he assured himself bitterly, as he sprang up and seized the text books and "notes" from the table.

"Curse the law," he exclaimed, as he turned towards the cheery fire. "I'll burn everything that reminds me of it."

Then he saw himself glance at the books, worn with constant use, and hesitate. He passed his hand lovingly over the faded titles, and gently replaced them on the table.

MacKenzie tore himself from the resurrection of the past, and turned to his prospective client.

"And Alma?" he demanded again.

"You can't blame me," whined Benson. "It was a fair fight between us, and Alma fancied me better, that's all."

"Is she living?"

"Yes."

"Is she well?"

"Yes."

"Does she know you are following a criminal career?"

"No, but she'll know now, for this is the first time I've been caught as bad as this."

"Why did you send for me?"

"I want you to defend me."

"I wouldn't take the case at all," declared MacKenzie. Get somebody else—Harrison, Drake, any of the criminal lawyers here."

"Why not?" pleaded Benson

getting a number of unimportant questions on the admission of evidence decided against him, and when the jury found a verdict of "guilty" without leaving the box, he promptly made a motion for a "reserved case" which, if granted, would enable him to argue the point before the Supreme Court and thus delay the matter for a few months.

"I can see nothing in your points, Mr. MacKenzie," announced the judge, "and no reason for any delay. Therefore I will not reserve a case. I will, however, set the date for execution so that you will have time to make a similar application to the Appeal Court at the next sitting if you wish."

At the next session of the Appeal Court of New Brunswick MacKenzie made his application for a "reserved case."

"We will give you the order, Mr. MacKenzie," said the Chief Justice; "but I will tell you now I do not see what you expect to gain by it."

This, of course, delayed the matter until the reserved case come on to be argued at the next sitting of the Court.

"I'm going to bowl you out in about three minutes," whispered the Attorney-General genially, when the case was called.

"I felt sure of that when I got the order," admitted MacKenzie.

The argument began; the Attorney-General promptly demolished MacKenzie's arguments, and the Court refused to interfere with the sentence.

MacKenzie argued his side of the case so skillfully, however, that he succeeded in convincing one of the three judges that he was right, and this judge dissented from the decision of the rest of the Court. The fact that one judge dissented gave MacKenzie a chance to appeal to the Supreme Court of Canada, and he promptly entered an appeal which was argued at the ensuing term of the Supreme Court.

"I cannot see what Mac is thinking of, following the case as far as he has," said one of the legal mem-

bers of the Commercial Club. "There isn't a ghost of a chance of winning, and as he is getting no money from the accused, it is a mystery to me."

"He must have some object," replied another, "and you must remember that MacKenzie is a peculiar chap. I've frequently heard him say that he was practising law, first, for the fun of it, and, second, for the amount of money he got, and a fellow with ideas like that is liable to do any old thing you can imagine."

When MacKenzie argued his appeal before the Supreme Court at Ottawa, the judges of that august tribunal refused to listen to his argument, and practically kicked him out of Court.

"It is an outrage," declared the Chief Justice, "to come here and take up the time of the Court with such childish arguments," and another member of the Court expressed the audible opinion that any lawyer who put up such a contention was an utter consummate fool.

MacKenzie calmly folded up his papers, and when the tirade from the Bench had ceased, bowed to the judges and walked out of Court. He had now reached the limit of his appealing ability, and, when two months later the sentence of the Court was carried out, there was considerable secret rejoicing among the more ambitious members of the Bar over the fact that the "dilettante attorney" has lost his first criminal case, and under such circumstances. Even a local editor who opposed him politically could not refrain from taking a fling at him on the first page.

MacKenzie read the article with an amused smile. "The wise legal lights and editors cannot see why I appealed, but I can see it mighty plainly," he remarked, and reaching in his desk he produced Benson's insurance policy, and re-read clause number 7. He turned to his stenographer and dictated a letter to a legal acquaintance in the town of Innisham.

"I am enclosing herewith," he dictated, "National United Insurance Policy Number 27985 on the life of the late Arthur Benson who was executed here last

given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other *person*, to the intent or purpose that such other *person* may obtain credit, money, or goods upon (*sic*), unless such representation or assurance be made in writing, signed by the party to be charged therewith.'

applies to fraudulent representations only, and not to innocent representations such as those of the local manager were shewn to have been, as appears from considering the abuses the Act was intended to remedy: to which Lords Parker and Wrenbury add that "person" in this enactment includes a corporation, for as the latter says (at p. 714):—

'If "person" does not include a corporation, the result would be that a representation as to the credit of a corporation would not be within the section.'

ii. That (so decided by the majority) under Order 58, r. 4 of the *Judicature Act* (*cf.* our R. S. O. 1914, c. 56, s. 27) which provides that

'The Court of Appeal shall have power . . . to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require.'

the Court may give judgment for the plaintiff on a point of law, such as whether there was any evidence to go to the jury on the question of the authority of the local manager in this case, although this has not been asked at the trial. But in some cases, as Lord Wrenbury says (p. 714):—

"It may well be that under the circumstances the Court of Appeal could not justly allow the point of law to be raised. For instance, it may be that if the point had been raised in the Court of first instance the party whose interest it was to dispute it would or could have called evidence which would affect the result. If so, the Court of Appeal would no doubt say that it would not be fair to allow it to be raised. But this is a totally different thing from saying that it cannot be raised."

It may be added that (p. 702) in the course of the trial counsel for Banbury admitted that the bank manager had no general authority to advise,—in other words, that it was not within the scope of the bank's

business to advise, on investments at large, but contended that under the circumstances of this particular case the manager had such authority. Lastly we may note, though space will not permit more, Lord Parker's adverse criticism (p. 709) of the present system which permits a plaintiff to set up at the trial, without amending his pleadings, a case other than that put forward in the statement of claim.

Practice—Costs—'The costs shall follow the event' —Order LXV., rr. 1, 2 (R. S. O. 1914, c. 56, s. 74 (3). In *Reid, Hewith and Co.* v. *Joseph*[3] the House of Lords finally settles, as the headnote states, an important point as to costs, by deciding that the expression "the costs shall follow the event" in the Rule which is our R. S. O. 1914, c. 56, s. 74 (3), regulating the costs in jury actions, means that the party who on the whole succeeds in the action gets the general costs of the action, but that, when the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it; and that an issue, in this sense, need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in whole or in part.

Bank and banking — Cheque — Negligence of customer in mode of drawing cheque. Next we have the very important banking case of *London Joint Stock Bank, Ltd.* v. *MacMillan and Arthur.*[4] The action was brought by the plaintiffs to have it declared that the defendants were not entitled to debit the plaintiffs with a cheque for £120, which had been paid by the defendants to one Klantschi, by whom it had been fraudulently filled up for £120 instead of £2. The bank resisted the claim on the grounds that the plaintiffs had drawn the cheque so negligently as to lead to

[3] [1918] A. C. 717.
[4] [1918] A. C. 777.

the fraud, and that the plaintiffs had entrusted the cheque, signed by them to Klantschi, authorizing him to fill it up. Klantschi was a confidential clerk in the employment of the plaintiffs. He had been with them for some years and they had no reason to distrust him. They left to him the keeping of their books and the filling in of cheques for signature. One day as one of the partners, Mr. Arthur, was leaving the office for lunch, Klantschi came up to him and said he wanted £2 for petty cash and produced a cheque for signature. He had repeatedly presented cheques for signature to get petty cash, but usually for £3. Mr. Arthur asked him why it was not £3 on this occasion. He replied that £2 would be sufficient. Mr. Arthur thereupon signed the cheque. Causes of suspicion arising, Mr. Arthur, two days later, went with his solicitor to the bank, when they found that the clerk had presented a cheque for £120 which had been paid to him. He had drawn the cheque in such a way that he could and had raised the cheque from £2 to £120, and had absconded with the money. When the cheque was presented to Mr. Arthur for signature and signed by him, there were no words at all in the spaces left for words; that space was a blank. There were the figures '2.0.0' in the space left for figures, with sufficient room before and after the 2 to permit of it being raised to '120,' which Klantschi did, adding the words 'one hundred and twenty pounds' in the space left for words. Their lordships all agree, approving the principle of *Young* v. *Grote*,[5] that the defendant firm had been guilty of a breach of the special duty arising from the relation of banker and customer to take care in the mode of drawing the cheque; that the alteration in the amount of the cheque was the direct result of that breach of duty; and that the bank were therefore entitled to debit the firm's account with the full amount of the cheque.

[5] (1827) 4 Bing. 253.

The judgments of their lordships are a monument of industry in respect to the review of all authorities, especially that of Lord Finlay, L.C., who says (pp. 789, 795, 799);—

"A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled. If he draws the cheque in a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty. . . . Of course the negligence must be in the transaction itself, that is, in the manner in which the cheque is drawn. It would be no defence to the banker, if the forgery had been that of a clerk of a customer, that the latter had taken the clerk into his service without sufficient inquiry as to his character. Attempts have often been made to extend the principle of *Young* v. *Grote* beyond the case of negligence in the immediate transaction, but they have always failed. . . .' The group of cases to which I have just referred (1855 to 1863) recognize the authority of the decision of *Young* v. *Grote*, while establishing that it applies only to cases in which the negligence is in the transaction itself and has no application to cases where the fraud has been merely facilitated by negligence in the custody of the seal of a corporation or of transfers in blank."

All their lordships call attention to the difference in the principles applicable to the case of banker and customer, and that of a holder, who is not the drawer, and an acceptor of a bill of exchange. Thus Lord Haldane says (pp. 814-5):—

"The acceptor of a bill of exchange may well be under the general obligation which affects persons who invite others to act upon their undertakings given for valuable consideration not to express these undertakings in such a form as may naturally mislead those who act upon them. But the customer of a bank is under a yet more specific duty. . . . What I wish to make plain is that in the case of a cheque drawn by a customer on his banker there is a special duty to exercise care in the framing of what is a mandate, a special duty which does not exist in the same fashion in the instance of the acceptor of a bill of exchange, where the instrument is drawn for circulation among the members of the public generally, and is not a direction to a designated person to pay out of a balance for which he has to account, a person who has a right to insist that the direction he receives to be acted on without any delay shall be so drawn as not to require exceptional consideration and so impose delay."

Lastly, the point taken by Lord Shaw (pp. 824-5) should be called attention to:—

"My Lords, it appears to me that a crucial consideration in a case such as the present is this, namely, what is the point of time at which these respective obligations meet," (*i.e.*, the reciprocal obligations of banker and customer). "The point of time is the presentation of the cheque. Not until that moment is the banker confronted with any mandate or order, and in my opinion the responsibility for the cheque and all that has happened to it between its signature and its presentation is not, and ought not to be, laid upon the banker. If at that moment three things are satisfied—namely, (1) that the cheque is duly signed, (2) that its appearance and statement of contents present no reasonable ground for suspicion, and (3) there are customer's funds available—then the banker is bound to pay. But if a banker were bound to inquire in regard to every cheque with a genuine signature what had been the history of that cheque from the time that the customer lifted his pen from it until the time when it was presented at the bank, banking business would be greatly impeded or impossible; and in my humble view it would be subjected to risks for which there is no foundation in legal principle."

Ship — Contract of carriage — Condition on passenger's ticket limiting shipowner's liability. The decision in *Hood* v. *Anchor Line, Ltd.*[6] may briefly be said to be this: When an intending passenger by a transatlantic steamer buys a ticket from the steamship company which has on its face a notice in conspicuous type that it is subject to the conditions thereinafter set out, and at the foot of which is printed very plainly in capital letters, "Passengers are particularly requested to carefully read the above contract," and which is enclosed in an envelope with a conspicuous notice upon its front asking the passenger to read the conditions of the enclosed contract, the passenger, in an action of negligence against the company in respect to injuries received during the voyage, will be bound by the conditions. The particular condition was one limiting the liability of the steamship company for injury to passengers to £10.

Lord Haldane says (p. 845):—

"If it had been merely a case of inviting people to put a penny into an automatic machine and get a ticket for a brief jour-

[6] [1918] A. C. 837; 87 L. J. P. C. 156.

ney, I might think differently. In such a transaction men cannot naturally be expected to pause to look whether they are obtaining all the rights which the law gives them in the absence of a special stipulation. But when it is a case of taking a voyage of some days, with arrangements to be made among other things, as to cabins and luggage, I think ordinary people do look to see what bargain they are getting, and should be taken as bound to have done so and as precluded from saying that they did not know."

Evidence — Copy produced from proper custody. Of *Permanent Trustee Company* v. *Fels*,[7] a decision under *The Evidence Act, 1898*, of New South Wales, it may be sufficient to note the point decided by the Judicial Committee that, although in certain circumstances a copy produced from proper legal custody may, after lapse of time, be treated as evidence, that rule does not apply when the original is in existence, and a copy capable of being obtained and properly proved.

Practice—New trial—Fresh evidence. In the same way in *Hip Foong Hong* v. *H. Neotia and Company*[8] it will suffice to note from the headnote the two points decided, that to obtain a new trial upon the ground that fresh evidence has been discovered, if no charge of fraud or surprise is brought forward, it must be shown that the fresh evidence would be conclusive; but that consideration does not apply to a case of surprise, much less to one of fraud; if a judgment is affected by fraudulent conduct it must be set aside; and that when it is alleged that a judgment has been obtained by fraud an independent action to set aside the judgment is a more convenient mode of procedure than a motion for a new trial supported by affidavits.

Principal and surety—Bank guarantee—Termination by notice. Egbert v. *National Crown Bank*[9] has been already noticed in our December number, 38 C. L. T. 720.

[7] [1918] A. C. 879; 87 L. J. P. C. 172.
[8] [1918] A. C. 888; 87 L. J. P. C. 144.
[9] [1918] A. C. 908.

Negligence—Master and servant—Defect in premises. The commentator on the English *Law Reports* for November has an *embarras des richesses* to contend with. We have already seen that in the number of [1918] A. C. It is true also of the number of [1918] 2 K. B. In *Cole* v. *De Trafford* (No. 2),[10] Cole was a chauffeur to Lady De Trafford, and while opening the door of her garage a heavy bit of glass, forming a window in the door, and 8 feet 5 inches above the ground, fell out from above his head and injured his hand. Inspection showed that the heavy glass had been originally held in by wooden beadings only secured with putty, that the top and one side beading had fallen away, and that some one had put in a nail to hold the glass. This state of things had apparently existed for a considerable time by the appearance of the putty. Cole had been there a fortnight and had not noticed the state of the window. This was practically all the evidence. There was none as to how long the defendant had been in occupation of the premises; whether she held as owner or tenant, or if as tenant, on what terms as to repairs; who put the nail in, or when it was put in; whether the defendant knew anything about the defect, or not, what, if any, arrangements the defendant had made for inspection of the premises, or what were usual and customary precautions as to inspection to take in the case of such windows which are not made to open. Under these circumstances the Court of Appeal held that there was no evidence of personal negligence in the defendant, and that, therefore, she was not liable. Once more one is lost in admiration at the conscientious and meticulous care with which the judges of modern England consider the cases which come before them, and the authorities bearing upon them. Space absolutely forbids such extracts from the judgments as one would desire to give. One extract from

[10] [1918] 2 K. B. 523.

Bankes, L.J., room must be found for. At p. 531 he says:—

"Whether the action is founded in contract or in tort, it is well established that in the absence of any special provisions the law presumes that the servant in entering into the contract of service undertakes as between himself and his master to run the ordinary risks which are incidental to the employment. . . . So far as the nature of the risk is concerned, I find nothing in the evidence to distinguish the risk to which Cole was exposed from the ordinary risk to which every domestic servant is exposed from accident arising from such causes as the falling of a picture or of a curtain pole, or the breaking of the leg of a chair or a table, due to some defect. All such accidents appear to me to fall within the class of accidents resulting from ordinary risks incidental to the particular employment. . . . In my opinion it cannot be said as a matter of law that a master is under any duty to his servants to have any periodical or other examination of ordinary domestic premises, which are apparently in good condition, for the special purpose of discovering whether any defects exist which may be a possible source of danger to the servants employed upon the premises."

And Scrutton, L.J., says (at p. 538):—

"I do not know of any obligation on a new occupier entering premises apparently free from defect to examine the whole premises for latent defects, either immediately on entry, or on the entry of each fresh servant. And I do not think a county court jury, who are not as a rule people who keep motor cars, are entitled to find without evidence what is the ordinary practice as to examination of a garage."

Damages—Repudiation by employer of contract with theatrical artiste—Loss of publicity. In *Turpin* v. *Victoria Palace, Ltd.*,[11] a music-hall artiste sued the defendants for breach of contract to engage her to perform at their music hall in four successive years for specified periods at a weekly salary. She claimed damages, not only for loss of salary, but also for loss of publicity, because the music-hall was well-known, and approbation of audiences there opened the gateway of London success to the artiste. McCardie, J., however, holds the damages for loss of publicity too remote. He says:—

[11] [1918] 2 K. B. 539.

'In actions for breach of contract many elements are excluded which may be considered in actions of tort. Malice, ignominy, and aggravation are deemed irrelevant in litigation upon ordinary contracts. . . . I conceive it clear that the point as to whether or no damages for loss of publicity can be recovered in any case depends primarily on the nature and true construction of the contract between the parties, and secondarily upon the special circumstances known to both parties at the time of the agreement. There can be, as I have said, no inherent reason why damages for loss of publicity should not in appropriate cases be recovered. . . . In every case where the question arises whether an employer is bound to provide actual employment the Court must apply the same rules of interpretation whether the employee be a traveller or a public singer, a clerk or a music-hall artiste. Hence I turn to the terms of the contract in the present case. . . . There is no clause whatever which can be said to place on the defendants any express obligation to call the plaintiff to appear and perform, and their only express obligation is to pay the agreed salary. . . . Upon a careful consideration of the contract and the circumstances of the case I have arrived at the conclusion that there was no implied obligation on the defendants to permit the plaintiff to appear at their hall during the contract periods. . . . Under such circumstances loss of publicity must be treated, in view of the written contract, as too remote and outside the business contemplation of the parties. . . . The fame, whether social or commercial, of an employer does not of itself involve a corresponding liability on his part to pay a higher degree of damages. If the wages and period of service be the same, the servant of a Cabinet Minister will normally receive the same damages upon wrongful dismissal as the servant of a provincial bookmaker."

Discovery — Inspection of documents — Privilege. Of *Fenerheerd* v. *London General Omnibus Co.*[12] we must be content to say merely that the Court of Appeal there decided that a certain joint statement in writing made by the plaintiff and her sister-in-law to one who was in fact the claims inspector of the defendants, but who the plaintiff and her sister-in-law supposed to be in representative of the plaintiff's solicitor, was privileged from discovery by the defendants.

There are no cases in [1918] P. which require notice.

[12] [1918] 2 K. B. 565.

Will—Gift of freeholds to A.—Gift after A.'s death of whatever remained of the freeholds to B. In [1918] 2 Ch. 304, the only case which seems to call for mention is *In re Dunstan, Dunstan* v. *Dunstan,*[12] and of that it will be sufficient to say that in it Neville, J., held that where a testatrix by her will gave freeholds absolutely to A. subject to the bequest that whatever of the freeholds should remain after A.'s death should be given to a named charity,—although if A. had survived the testatrix the gift to the charity would have been repugnant and void, and A. would have taken absolutely,—yet A. having died in the lifetime of the testatrix, the doctrine of repugnancy did not apply, and the gift to the charity was accelerated and took effect.

CANADIAN DECISIONS.[1]

The commentary on English decisions has taken so much space that it is fortunate that the thick December number of 43 O. L. R., though containing an unusual quantity of short cases, seems to contain none calling for special mention.

Constitutional Law—Criminal offence—Provincial powers. In the number of 43 D. L. R. issued on November 15th we have a decision of the Manitoba Court of Appeal, in line with *Drapeau* v. *La Cour du Recorder de Quebec,*[2] noted by us in an issue for last month (p. 785), *viz., The King* v. *Lorette,*[3] holding that a municipal by-law attempting to deal with and impose punishment for an indictable offence already dealt with by the *Criminal Code,—viz.,* interfering with anybody taking cattle to the pound—is *ultra vires.*

[12] [1918] 2 Ch. 304; 87 L. J. Ch. 597.

[1] As most of our subscribers have ready access to the Canadian Reports, it is not deemed necessary to review the Canadian cases in the same detail as the English. Only those which seem of special interest and importance will, therefore, be noticed.

[2] R. J. Q. 27 K. B. 500. This has been affirmed on appeal: 43 D. L. R. 309.

[3] 43 D. L. R. 129.

Chattels—Affixed to freehold by own weight only. In the number of 43 D. L. R. issued on December 2nd last, we will, at any rate, mention the case, before the British Columbia Court of Appeal of *Dominion Trust Co.* v. *Mutual Life Assurance Co.*,[4] not because the point decided is not well settled, but because it is one, as it seems to us, not very often met with. It is this, —that if an intention to make chattels part of the freehold is sufficiently established from all the circumstances of the particular case, they may be held to be part of the freehold notwithstanding that they are not affixed otherwise than by their own weight to the freehold.

Commercial law — Law of Quebec — Joint and several liability. In *Rapports Judiciaires de Québec,* 54 S. C. for November, *Casaubon* v. *Bedard*[5] is a decision of Panneton, J., that under Quebec law several persons who sign an instrument (un billet), as follows: "We promise to pay" are liable jointly and severally if it is given for a commercial debt: it is otherwise 'si la dette est civile." The "civil debt" in question arose from the sale in small quantities of cigars and refreshments to members of "un club d'amusements."

Lease of House—Responsibility of tenant. There is also to be noted the decision of Guerin ,J., in *Commercial Properties, Ltd.* v. *La Compagnie Leduc,*[6] that where a tenant leaves rented premises, he should turn off the water and drain the water out of the pipes; if he neglects this precaution, he is liable for the damages that may be caused to the owner through the breaking open of the pipes and the flooding of the house.

A. H. F. L.

[4] 43 D. L. R. 184.
[5] R. J. Q. 54 S. C. 385.
[6] R. J. Q. 54 S. C. 392.

CONTEMPORARY LEGAL REVIEWS AND PERIODICALS.[1]

The *American Law Review* for September-October opens with four Articles with attractive titles: *The Democracy of To-day and the Democracy of To-morrow; American Democracy and Russian Democracy; The Co-ordinate Powers of Government;* and *Where does Governing Power Reside?* In the first, which is by the Hon. W. J. Adams, Judge of the Superior Court of South Carolina, we note with special interest the statement that—

'There seems to be one certainty: the day is coming when the people of the United States will be required to elect between the continuance of a government based upon a written Constitution which embodies its fundamental, organic law, and the establishment of a government without organic law.'

Also the reference to those who, in the present organization of society, find only evil, expressed in such terms as "corruption of public life," the "enervation of the idle and the unemployed," the "degeneracy and decay of morals and manhood;" and who insist that the problems thus presented, have a common origin and a common method of solution:—

'The origin is the privilege of private ownership; the solution, the abolition of this privilege and the substitution of collective ownership in all things from whch the nation derives its livelihood,—land, mills, mines, coal-beds, oil-fields, forests, as well as the means of transportation, and communication. This doctrine implies the suspension of law, the repudiation of the recognized functions of the Courts, the confiscation of property, the overthrow of the national government, the destruction of the American Republic, and the substitution of a phantasmagorial structure which is to be called the "Co-operative Commonwealth." '

In the second Article, Mr. Everett P. Wheeler has little difficulty in showing the favourable contrast the

[1] It is by no means the intention of the C. L. T. to make this monthly feature a mere jumble of extracts. Numerous exchanges from different parts of the Empire and from the United States are examined, and attention is called, month by month, to whatever seems most striking and important in them.

growing prosperity of American Democracy presents to that of the Bolshevist Democracy of Russia. Referring to the attacks being made by the 'revolutionists of whom there are many in this country,' he says:—

> 'The lawyers of this country who know what our law is and who are best qualified to refute the slanders that zealots constantly repeat, must develop a public sentiment which shall prove an antidote to the poison which is being assiduously infused. A gas mask is as much needed in this country as it is at the front.'

The Article on *The Co-ordinate Powers of Government* is by Gen. C. A. Hereshoff Bartlett, and is a very decisive vindication of the fundamental principle in the Constitution of the United States, of the co-ordinate powers of the three great factors of government, the Executive, the Legislature, and the Judiciary, as against the recent revolutionary proposal of the Senator from Oklahoma to enact that—

> 'as the Federal Child Labour Law of 1916 had been declared constitutional by Congress and the President at the time of passage any executive or judicial officer who in his official capacity denies the constitutionality of that Act should *ipro facto* vacate his office; that no judge of an inferior Federal Court should permit the question of the constitutionality of that Act to be raised in the Court over which he presides and that the United States Supreme Court should have no appellate power to pass upon such question.'

The Senator from Oklahoma has evidently yet to acquire an elementary knowledge of the principles of the Constitution of his country, and how alone it can be legally amended. The sovereignty of Parliament is the most vital feature of the British Constitution differentiating it from that of the United States, the underlying principle of which, as the writer of the Article has no difficulty in making abundantly plain, is that the three powers of government are co-ordinate, and no one of the three branches of government can interfere with, detract from, or encroach upon the other. Each one of these is supreme within its legitimate sphere of action. As one of the cases he cites expresses it—

'The legislative is not supreme; it is only one of the organs of that absolute sovereignty which resides in the whole body of the people; like other departments of government it can only exercise such powers as have been delegated to it, and when it steps beyond that boundary its acts are utterly void.'

The fourth Article, *Where does the Governing Power Reside?* is by the Hon. Walter Clark, and supports, strange to say, though to our mind quite ineffectively, the Senator from Oklahoma. The writer says—

'The question, however, narrows down to this: "What clause in the Federal Constitutions confers upon the Court the irreviewable veto upon an Act of Congress passed by the two Houses of Congress and approved by the President?" If there is such, let it be pointed out, and end the controversy.'

Very good! We think we can oblige the honourable gentleman. It is the clause which lays down how, and how alone the Constitution can be amended. This necessarily imports that the Supreme Court shall have power to pass on the constitutionality of Acts of Congress, for otherwise Congress could amend the Constitution at will, even as the British Parliament. Surely we may say *Cadit quæstio.*

We cannot devote more space to this admirable number of the *American Law Review,* except to say that it has its usual interesting comments on *Current Topics and Notes,* and *The Docket.*

The *Harvard Law Review* for November is indeed to be congratulated on producing an Article by Oliver Wendell Holmes. It is on *Natural Law* and seems to us full of the maturest wisdom. The opening paragraph is delightful:—

'It is not enough for the knight of romance that you agree that his lady is a very nice girl—if you do not admit that she is the best that God ever made or will make, you must fight. There is in all men a demand for the superlative, so much so that the poor devil who has no other way of reaching it attains it by getting drunk. It seems to me that this demand is at the bottom

of the philosopher's effort to prove that truth is absolute and of the jurist's search for criteria of universal validity which he collects under the head of natural law.'

It is undoubtedly true, as it seems to us, that 'our test of truth is a reference to either a present or an imagined future majority in favour of our view,'—always remembering that in fact that is no test of truth at all. Pilate's question,—"What is truth?" can get no other answer under human conditions. Profoundly true, again, is the remark that—'we all, whether we know it or not, are fighting to make the kind of a world that we should like.' It seems to us that all that is sound in the theory of "natural law" is admitted where the writer says:—

'No doubt it is true that, so far as we can see ahead, some arrangements and the rudiments of familiar institutions seem to be necessary elements in any society that may spring from our own and that would seem to us to be civilized—some form of permanent association between the sexes—some residue of property individually owned—some mode of binding oneself to specified future conduct—at the bottom of all, some protection for the person.'

As to the "ought" of natural law, is it not found in the fact that human society cannot be preserved without conformity with these vital, fundamental, conditions? But as Mr. Justice Holmes himself says—to those who agree with him he is uttering commonplaces. And to quote him again, we really must not suppose 'that the ultimates of a little creature on this little earth are the last word of the unimaginable whole:' 'What competent person supposes that he understands a grain of sand? That is as much beyond our grasp as man.'

There is also a long and able Article on *Letters of Credit* by Omer F. Hershey, in which the writer discusses the legal difficulties growing out of the various forms of so-called "commercial letters of credit" used in financial over-seas trade,—a method which has come into common use by Americans in its foreign trade only since the war.

Lastly, there is an Article on *The Child Labour Law case,* by Thurlow M. Gordon.

It is earnestly to be hoped that Sir John Macdonell, the learned editor of the *Journal of Comparative Legislation,* will find time to collect and publish the many interesting lectures he has delivered of late years. We see from *Law Notes* of November that he has been delivering one at University College on "The Place of Greek Law in Jurisprudence." We are gratified to see in the same issue a laudatory reference to Mr. Hayward's "Legal Fiction" in our August number.

The *Solicitors' Journal and Weekly Reporter* of November 9th contains an Article on "The Priorities of Equitable Claims to Trust Funds;" and the issue of November 23rd has one on "The True Doctrine of the Old Use," by Mr. Charles Sweet.

Law Notes (Northport, N.Y.), for November has a long Article by Otto Erickson, on "Mental Defectives and the Criminal Law;" and that for December has one on the very live question at this moment of "The Effect of Cessation of Hostilities on Government War Contracts."

The *Yale Law Journal* for December has Articles on "The Declaratory Judgment—A Needed Procedural Reform," by Edwin M. Borchard of Yale University Law School; on "The Freedom of the Land and Freedom of the Seas," by Professor T. S. Woolsey, of Yale; and on "Constitutional Objections to the Railway Control Act," by Blewett Lee, of the New York Bar.

We have also received *The South African Law Journal* for August which reproduces from the *Law Quarterly Review,* Lord Justice Scrutton's Rhodes Lecture on "The War and the Law," and which refers in a complimentary way to the Article entitled

"Flaws in the Common Law" in our number for last March; and contains a long Digest of South African Decisions; *The American Law Review* for November-December, with, *inter alia*, an Address on "Allegiance to the Constitution," by Hon. C. W. Mullan, President of the Iowa State Bar Association, and an Article on "The Rights of Trustees to Derive Indirect Profits from the Handling of Trust Funds," by Thos. G. Frost, Ph. D.; *The Michigan Law Review* for November, with Articles on "Alien Rights in the United States in Wartime," by W. C. Hunter, of Princeton University, and on "Federal Incorporation," by Myron W. Watkins, of the University of Missouri; and the latest issues of *The Scottish Law Review; The Central Law Journal; The Scots Law Times; The Insurance Law Journal; The New Jersey Law Journal; The Irish Law Times and Solicitors' Journal; The Madras Law Times; The Madras Law Journal; The Calcutta Law Journal;* and *The Criminal Law Reporter* (Parvatipuram).

CORRESPONDENCE.

Toronto, December 20th, 1918.

Editor, Canadian Law Times.

SIR,—I read with interest in a recent issue of *The Toronto Star* the following letter:

HATS OFF IN OSGOODE HALL.

To the Editor of the Star.

SIR,—I notice in your paper an item about prohibiting the bringing of hats into the library at Osgoode Hall. I remember during the time that Hon. Sandfield MacDonald was Premier and Attorney-General that he came into the library one day and vigorously denounced the prohibition there was then against wearing hats in the library. He said that a member of Parliament could wear his hat in the House of Parliament while in session, and he did not see why members of the legal profession should be prohibited from wearing their hats in the Osgoode Hall library.

Y. S.

I must say that the above has much raised my opinion of the Hon. Sandfield MacDonald. It might not be a bad thing if Canadians generally cultivated a little more of that sturdy independence and individuality which makes the home Englishman resent very emphatically any committee or body of persons undertaking to instruct him as to his proper deportment in such matters as removing his hat in a public library.

Yours, etc.,

BRITON.

NEW BOOKS AND NEW EDITIONS.

The Army and The Law, by Garrard Glenn of the New York Bar; Associate Professor of Law, Columbia University; Author of Creditors' Rights and Remedies: New York, Columbia University Press, 1918. Pp. 190, Table of Cases, and Index.

Handbook or Military Law, by Austin Wakeman Scott, Professor of Law, Harvard University: Cambridge, Mass. Harvard University Press, 1918.

These are two publications which may be said to have arrived a day too late for the fair. The former deals with the army only in its relation to the common law which governs the general public, and with the soldier only in so far as his activities are, in point of law, of interest to non-military persons. It is an endeavour simply to assemble the principles of law which impose duties upon the civilian, citizen, or enemy, quite as much as they give him rights which the army must observe. Judging by a careful perusal of the chapter which, happily, possesses most living interest now, that, namely, on the Relation of Soldier to Civilian in Time of Peace, we can see that the little book is very carefully and lucidly written.

The *Handbook on Military Law* is intended primarily as a text-book in the course on Military Law and Practice in the colleges in which units of the Students' Army Training Corps have been established. It contains the Articles of War with comments thereon and extracts from the Manual for

Courts-Martial, together with the Selective Service Law and amendments thereto and a few recent judicial decisions. It presents the fundamental principles of the subject in a simple way.

A Digest of the Law, Practice and Procedure relating to Indictable Offences, being Archbold abridged, and Alphabetically arranged, by Arthur Denman, M.A., F.S.A., barrister-at-law, and Clerk of Assize for the South-Eastern circuit, assisted by William Cecil Bernard, M.A., LL.B., barrister-at-law and Clerk of Indictments on the same circuit. Second Edition: London: Sweet & Maxwell, Ltd., 3 Chancery Lane; Stevens and Sons, Ltd., 119 & 120 Chancery Lane, 1918. Pp. 734. Price $7.50 net.

Mr. Arthur Denman has been for thirty-two years Clerk of Assize, in itself a strong recommendation of this work. We have studied it enough to say with confidence that it will be of the greatest utility to those who practice in the criminal Courts. The authors deserve credit for persevering with their work in face of the delays and difficulties which have confronted them. The book was ready for the publishers in the spring of 1915; but the upheaval of the war caused the manuscript to be laid aside, and the authors to turn to work of a nature more helpful to the country at large. Meanwhile a new edition of *Archbold* itself (1918) has appeared, occasioning every reference in the authors' manuscript to be altered and adapted to it. A book like *Archbold* well admits of abridgment, for what the lawyer really faithful to his trust chiefly wants is a reference to the cases which he will then look up for himself; and the alphabetical arrangement is a very valuable feature of this book. *Archbold* comprises 1,566 pages, besides a Table of Cases, and costs $12.50. This Digest has no table of cases, but the alphabetical arrangement and the nature of the subject enables the authors to dispense with that, and so economize space and expense.

The Centennial History of the Harvard Law School, 1817-1917: published by The Harvard Law School Association, 1918. Pp. 401, and Indices.

This is a Memorial volume of which the Harvard Law School Association may well feel proud. It is not

only full of historical and personal interest, but is a mine of information and instruction for all interested in any way in legal education. The photograph illustrations are excellent in workmanship, and enable us to see in their manner as they lived the bearers of such illustrious names as Joseph Story, Christopher Columbus Langdell, John Chipman Gray, Ezra Ripley Thayer, James Barr Ames, Joseph H. Choate, Oliver Wendell Holmes (happily still living) and many others. One cannot resist paying a tribute of admiration to the strength and intellectuality portrayed by the very features of these representatives of the Harvard Law School. In an appendix is given most interesting details of their lives and work and methods. The *primordia rerum* in the case of Harvard Law Shcool must, it would seem, be looked for in the will of Isaac Royall, a wealthy citizen of Massachusetts, then resident in London, which will is dated May 26th, 1778, and provided for "a Professor of Laws in (Harvard) College." Royall died in 1781, but it was more than thirty years before Harvard Corporation got together the proceeds of the legacy: and on May 17th, 1817, Isaac Parker, Chief Justice of Massachusetts, appointed first Royall Professor of Law on August 18th, 1815, presented to the Corporation a plan in writing for a law school, which was adopted, and Asabel Stearns was elected University Professor of Law to take charge of the school. Thus commenced Harvard Law School which never, perhaps, occupied a higher pinnacle of fame than it does at the present time. An interesting account is given of the institution of the case-law method of instruction by Professor Langdell, which the Austrian legal scholar, Josef Redlich, has called "an entirely original creation of the American mind in the realm of law." Appendix III. contains a Bibliography of the legal writings of teachers at the School, while Appendix V. is a bibliography of the case system and other topics in American legal education. We shall pro-

Alex. Millar, of Kitchener, Ont., senior partner of the law firm of Millar, Sims, and Bray, on December 11th, at Kitchener, in his 84th year.

George S. Matthews, of Vermillion, barrister, at Vermillion, on December 5th, in his 33rd year.

Camille Le Moyne, of Martigny, advocate of St. Jerome, at Dupont Hospital Montreal, on December 9th.

W. Brooks Waters, of Calgary, barrister, on November 17th, at Medicine Hat.

John P. Whelan, of Montreal, advocate, at Montreal, on November 12th, in his 49th year.

The Hon. Wm. Wilkinson, of Chatham, N.B., formerly County Court Judge, on November 21st, at his residence near Chatham, in his 93rd year.

Edward Caldwell, of Moose Jaw, Sask., barrister, at Moose Jaw, on October 31st, in his 42nd year.

Albert Monkman, of Winnipeg, barrister, on November 5th, at Winnipeg, in his 69th year.

THE GAZETTES.

The *Canada Gazette* for December 28th contains the Royal Proclamation proroguing Dominion Parliament till February 4th, 1919.

With the exception of the above there is nothing in the Dominion or Provincial Official Gazettes since our last issues requiring notice here.

The Canadian Law Times.

VOL. XXXIX. FEBRUARY, 1919. No. 2

BY THE WAY.

The *Canadian Law Times* proposes to inaugurate in its next number a symposium — some other word seems needed in these days—on the subject of Legal Education. Contributions, limited so far as possible to about one thousand words each, are cordially invited from any who have ideas on this important subject.

* * *

What is Canada going to settle down to in the matter of titles? Probably nearly all will agree that the social and economic conditions of this country are unsuited to hereditary titles; and it is equally natural that the development of democratic feeling should make the *vox populi* pronounce with increasing decision even against knighthoods, though they are not hereditary, especially as they are suspected of being the reward, very frequently, of wire-pulling, and of party, rather than public, services. On the other hand so long as we remain a united Empire and subjects of the King, it seems a pity, and an anomaly, that, under no circumstances, should public service be permitted to receive titular recognition at the hands of the sovereign. Might not a wise compromise be found by distinguishing between prefixes and affixes: in stopping the former, but not the latter. Every graduate of a University is entitled to an affix of B.A., or M.A., or LL.B., or as the case may be. Why then should affixes such as C.B., C.M.G., or O.B.E., be objected to? Affixes

will never minister to snobbishness as prefixes may undoubtedly do; nor would they tempt in nearly the same degree to wire-pulling for the obtaining of them. No doubt it may be objected—Why should colonial subjects be thus confined to the lower stages of the Orders of Knighthood? But there is no reason why they should. All that is necessary is to bar the use of the prefix "Sir." Apart from this a Canadian could still be a K.C.B., or a K.C.M.G. or hold any other knighthood. Already the same thing is the case with foreign Honorary members of these Orders. General Pershing is, we believe, either a K.C.B., or a K.C.M.G. But he would not think of using the prefix "Sir." Apart from this, however, and even if Canadians were not permitted to accept more than the C.B., or the C.M.G., and not the K.C.B. or the K.C.M.G., would that be any ground of objection when it was done purely at the request and in accordance with the wish of this country?

* * *

An American correspondent has kindly called our attention to a recent interesting judgment of the New York Supreme Court, Appellate Term, in a case of *A. F. T. Corporation* v. *Pathe Exchange,* affirming the rule that one who deals with a vendor of stolen goods does so at his peril; and if the true owner replevies them from him, he cannot recover any damages for any trick or device on the part of the true owner which induced him to purchase the goods—in this case the use of a detective who pretended that he represented a prospective purchaser to whom the goods might be resold—unless the owner has represented expressly or impliedly that the goods were not stolen.

* * *

Some criticism has been provoked by recent appointments of members of the Judiciary to act as arbitrators and commissioners upon various disputes and enquiries. We are reminded by it of the following

resolution which was passed by the Canadian Bar Association at its meeting in Montreal last September:—

'Members of the Judiciary should be suitably rewarded for their service to the State, and should not find it necessary to increase their annual allowances by using their time and impairing their efficiency for the service for which they are appointed, and their duties and privileges should be defined and limited by statute, so as to secure to the State the service intended when the position was accepted and appointments made, namely, that all their time, skill, and legal attainments should belong to the State. This meaning of the acceptance and appointment is too often overlooked, and absence from duty as arbitrators, commissioners, and the like, has become very prevalent, and is conducive of neglect of duty and of adverse criticism, and tends to lessen the esteem and dignity of the position.'

* * *

One of the appeals now pending before the Judicial Committee of the Privy Council from the province of Quebec involves very peculiar circumstances if we correctly understand it. It is in the case of *Despatie v. Tremblay*. Their lordships have already heard the appeal argued once; but announced that they desired a re-argument, which has not yet been had. It is a case in which a Roman Catholic married his third cousin. The local priest found it out, and informed him that he was living in sin, but that matters could be put right by obtaining an episcopal license. This he declined to do,—possibly because he was tired of his bargain,—whereupon an ecclesiastical Court pronounced the marriage null and void as the parties were within canonically prohibited degrees. Application was then made to the Superior Court for a judgment declaring the marriage null, which the Court granted on the mere production of the decree of the ecclesiastical tribunal. On appeal the Court of Review directed a new trial on the ground that the Superior Court must, at all events, go into matters for itself and hear evidence, and make up its own mind on the point of law. The new trial was, accordingly, held, and the marriage again declared null, which was upheld in appeal by the Court of Review, from which is the appeal now before the Privy Council.

There are more than one indication that our Canadian Constitutional law will soon occupy a much larger space in the thoughts of men than it has hitherto done. Not long ago a scheme was announced for a federation of all the British islands in the South Pacific under some central authority having its seat of government at the most convenient centre, and presided over by a Governor-General, or High Commissioner, who would be assisted by a Council composed of appointed officials, representatives elected by each island group, and trade commissioners representing Great Britain, Australia, New Zealand, and Canada. On the other hand there were to be local legislatures with as large a measure of self-government as is compatible with the proportion of whites to South Sea Islanders and Asiatics at present unsuited to free institutions. Now there comes news of a new political association called the Irish Centre Party, embracing constitutional Nationalists and Southern Unionists, Mr. Stephen Gwynn, the noted author and poet, being chairman of its Provisional Executive Committee, and its platform including Home Rule for Ireland within the British Empire, on lines similar to those followed by the present self-governing British Dominions. Now our Constitutional law is a store-house of hints and information for the advocates of such schemes as this. To no quarter can they direct their attention more advantageously than to this Dominion, whose Federal Constitution has worked on the whole so smoothly and happily, and has been developed in more than half a century of recorded decisions.

THE LATE E. F. B. JOHNSTON, K.C.

We have been favoured with the following:—

'In the passing of Mr. E. F. B. Johnston, K.C., the legal profession of Ontario has lost one of its brightest and most interesting members. He was most devoted to his profession, and for many years his opinion and professional talents were eagerly sought by those requiring assistance in legal matters. He was well and favourably known from one end of Ontario to the other, and had frequently been employed in matters of public interest in other provinces. His rule was never to accept a brief unless he had time to devote to its thorough preparation before going into Court; and much of his success in cross-examination was due to his having in the preparation of his case carefully thought out all the circumstances surrounding the matter in hand and knowing thoroughly the complete background and staging of all the acts connected therewith. In addition to his painstaking preparation, he brought to his task a native shrewdness and powers of deduction abnormally developed. One instance will serve to illustrate.

He once was briefed in an action brought against an estate agent by his principal for an accounting in respect of a secret profit. The principal knew but little as to the value of the land, and had followed the advice of the agent in accepting the offer procured by the latter. A few days later he learned that the land had been re-sold by his purchaser for double the amount of the first sale price, and at once suspecting the agent of having, after learning that he could effect a sale, put in an offer for half the amount in the name of a friend, he instructed the bringing of an action to compel the agent to account for the secret profit. The first purchaser was called at the trial, and his cross-examination was about as follows:—

Q. You were formerly in business at——, in a Gents' Furnishing business? A. Yes.

Q. Were you making money here? A. Yes.

Q. Where are you located now? A. At ——— (a small village in the north country.

Q. Doing what? A. In same kind of business.

Q. You sold out your business and real estate here? A. Yes.

Q. In difficulty, were you? A. (After some hesitation). Well —yes.

Q. With a woman?

(Mr. Johnston said when men were in difficulties it was either financial or a woman, and the former answer had excluded the financial reason).

The witness now thought the counsel knew all about his case, for it was the fact that he had been threatened with a breach of promise suit, although the counsel did not then know of it.

After some hesitation and coaxing, the witness said "yes."

The cross-examination then proceeded:—

Q. You were going to be sued? A. Yes.

Q. And thought it best to get your property where a judgment could not reach it? A. Yes.

Q. Then do you mean to tell the Court that in those circumstances you bought another piece of property right under her nose? Tell us now—how much did you get out of the deal? A. $1,000.

Q. And the agent got the other $7,000? A. Yes.

And the action was won.

The above incident was told me by the solicitor for the plaintiff, and he said it was the most brilliant piece of deductive examination he ever saw. There was nothing whatever on his brief to suggest the line of examination which he so successfully took.

Mr. Johnston was a very pleasing after-dinner speaker, and was heard by many societies and clubs throughout Ontario and elsewhere. And no one could better tell a good story or more enjoy and appreciate a humourous tale. He was a Bencher of the Law Society and took a deep interest in his duties as such, and in those of the profession at large. In politics he was a Liberal, and in religion a Presbyterian.

We deplore his passing.'

OUR LONDON LETTER.

44 Bedford Row, London, W.C. 1.
January 6th, 1918.

The Editor,
"The Canadian Law Times,"
Toronto, Canada.

Sir.—The conclusion of the armistice and the consequent cessation of hostilities—the prelude to a victorious termination of the great struggle in which the Allies have been engaged for more than four years—has, of course, been the engrossing topic since my last letter. The end of the struggle, so swift in its last stages and so complete, has filled all hearts with joy and gratitude, and the expectation of the speedy return of the blessedness of peace has kindled a new hope for the future.

The late Parliament, the thirtieth Parliament of the United Kingdom, met on January 31st, 1911. It passed the *Parliament Act* in order to abolish the veto of the House of Lords upon legislation, after the opposition of that House had been overborne by the threat of a wholesale creation of new peers. The House of Commons then passed bills for the self-government of Ireland and the disestablishment of the Church in Wales in three successive sessions, and these bills were passed into law under the *Parliament Act* over the heads of the House of Lords, but simultaneously there was passed another Act suspending their operation until the end of the war.

One of the most enduring results of the labours of the late Parliament is the *National Insurance Act* of 1911. Its last session will, however, be notable not only because it saw the cessation of hostilities, but also because amid the pre-occupations of the war there were passed two far-reaching measures of social reform, the *Representation of the People Act,* effecting a revolution in the franchise and securing votes for women,

and the *Education Act*, effecting changes of great importance in the national system of education.

Elected in time of peace on purely domestic questions, the late Parliament found itself after some three and a half years suddenly transformed into a War Parliament faced with the supreme issues of national existence. It adapted itself slowly to the new conditions. In May, 1915, a purely Liberal Government was displaced by a Coalition Ministry with Mr. Asquith still as Prime Minister. In December, 1916, Mr. Asquith resigned his place to Mr. Lloyd George, who formed a new Coalition Government whose most remarkable feature was a small War Cabinet in the place of the large Cabinet previously existing. Elected for seven years the late Parliament had, under the provisions of the *Parliament Act, 1911,* reduced its term to five years, but as it was obviously undesirable that a General Election should be held during the continuance of hostilities, five successive Acts were passed extending its life, and it ultimately came to an end in the fourth quarter of its eighth year. During its long life the Parliament effected some of the most far-reaching constitutional and social changes in our history, and its war emergency legislation surpassed in originality and thoroughness anything that any politician has ever dreamed of.

Among the Acts to which the Royal assent was given prior to the prorogation of Parliament was the *Parliament (Qualification of Women) Act,* enabling women to be elected as members of the House of Commons, and an Act—the *Termination of the Present War (Definition) Act*—dealing with the date at which the war is to be considered as terminated. It will be remembered that in an earlier letter I called attention to the Report of the Attorney-General's Committee, of which Mr. Justice Atkin was Chairman, on the meaning of the term "period of the War" and other similar expressions used in the Emergency legislation and in contracts and other documents. In the second interim

Report it was pointed out that the Emergency legislation and all orders made thereunder would necessarily lapse on the termination of the war, since the power to make regulations conferred by the *Defence of the Realm (Consolidation) Act, 1914,* exists only during the war. As to what in substance is meant by the end of the war, the Committee expressed their opinion in the first interim Report. "Speaking," they said, "of the legislation generally, the war cannot be said to end until peace is finally and irrevocably obtained; and that point of time cannot be earlier than the date when the treaty of peace is finally binding on the respective belligerent parties, and that is the date when the ratifications are exchanged." They advised that there should be some method of declaring authoritatively the exact date at which the country ceases to be at war with all or any of the enemy powers, and they were of opinion that statutory power should be obtained to enable this date to be fixed by Order in Council. This is the method adopted in the *Termination of the Present War (Definition) Act,* which provides that His Majesty in Council may declare what date is to be treated as the date of the termination of the present war, which shall be treated as having ended on that date for the purpose of any provision in any Act of Parliament, Order in Council or Proclamation, and (except when the context otherwise requires) of any provision in any contract, deed or other instrument referring expressly or impliedly to the present war. The date so declared shall be fixed with regard to, and shall not be later than, the date of the exchange or deposit of ratifications of the treaty or treaties of peace. It will apparently still be necessary to obtain special statutory authority in the case of any emergency legislation which may be required for any longer period.

The House of Lords have rejected the Bill introduced by Lord Buckmaster to enable the English Court to pronounce a decree of dissolution of marriage where there has been separation by wilful desertion of either

spouse, or by order of the Court, for a continuous period of five years. The number of peers voting on the Bill was small, 29 voting for it and 39 against it.

Under the authority of the War Cabinet the Attorney-General has appointed a Committee (of which Sir John Macdonell is chairman) to inquire into and report upon (1) the facts as to breaches of the laws and customs of war affecting members of the British forces or other British subjects committed by the enemy powers; (2) the degree of responsibility attaching to individuals; (3) the constitution and procedure of a proper tribunal for the trial of these offenders; and (4) other cognate and ancillary matters. The Committee will act in consultation with similar Committees in Allied countries.

In the recent case of *Casdagli* v. *Casdagli* the House of Lords has now authoritatively declared that it is judicially possible for a British subject to acquire a domicile in Egypt so as to oust the jurisdiction of the High Court in England to entertain a petition for dissolution of marriage. The law as now finally settled by this decision will have far-reaching consequences on the status of British subjects in Egypt and other Eastern countries where British subjects enjoy privileges and are governed more or less by the law of their own country instead of by the ordinary law of the place of their residence.

Sir George Cave, who has been Home Secretary since December, 1916, has been appointed a Lord of Appeal in Ordinary in succession to the late Lord Parker of Waddington, and the dignity of a viscount of the United Kingdom has been conferred upon him. The new Lord of Appeal, who is sixty-two years of age, had a distinguished career at the Chancery Bar, and has always enjoyed a very high reputation as a man of clear judgment and profound legal knowledge. Appointed Solicitor-General in October, 1915, in succession to Sir Frederick Smith, he held that office until

December, 1916, when he became Home Secretary. Lord Cave's methods were not always suited to the rough-and-tumble of political life, but the House of Commons, in which he sat as a Unionist from 1906, had always a high appreciation of his merits; and those who know him best are convinced that he will make a great judge. It will be remembered that earlier in the year Lord Cave was offered the position of Master of the Rolls, but at that time was not desirous of quitting political life.

Mr. P. Ogden Laurence, K.C., has been appointed a Judge of the Chancery Division of the High Court of Justice in the place of the late Mr. Justice Neville. The new Judge, who is 56 years of age, was called to the Bar by Lincolns Inn in 1882 and practised for some time in the Palatine Court of Lancaster. He became a K.C. in 1896 and has had a large practice at the Chancery Bar and before the House of Lords and the Judicial Committee of the Privy Council. For some time he has been Chairman of the General Council of the Bar. No doubt the new Judge will show on the Bench the qualities of keenness and capacity for work which have given him a foremost place at the Equity Bar.

It is understood that a scheme is now on foot to transfer the bankruptcy jurisdiction in the High Court from the King's Bench to the Chancery Division. For many years jurisdiction in bankruptcy has been exercised by the Common Law Courts and by the County Courts with general satisfaction to all concerned, and it is difficult to understand the necessity for any change. It may be mentioned that, according to the official figures, insolvency in 1917 again showed a decrease, this decrease being continuous since the last pre-war year 1913.

Sir F. E. Smith, K.C., the Attorney-General, has been elected Treasurer of the Honourable Society of Gray's Inn for the third year in succession, being the

first Bencher of that Inn to be so honoured since the time of Sir Francis Bacon, who was re-elected in the same way while acting as Attorney-General.

The King has conferred a peerage of the United Kingdom upon Sir William Pickford, the new President of the Probate, Divorce, and Admiralty Division, who has taken the title of Baron Sterndale. The new Baron is the first President who has been raised to the peerage during his period of office since Lord Penzance received a similar distinction shortly after his appointment as President of the Division in 1869.

Yours, etc.,

W. E. WILKINSON.

A NOTABLE BICENTENARY.

The suggestion of Mr. Justice Chisholm that the bicentenary of the establishment of the first Court of Judicature, administering the common law, within what is now called the Dominion of Canada, should be suitably celebrated by a meeting of the Canadian Bar Association in Nova Scotia in 1921, is an admirable one.

The reasons given in the *Canadian Law Times* appeal powerfully to every lover of the common law and to every student of history. It is interesting to note that in 1721 the "lawes of Virginia" were made the rule or pattern to be followed in Nova Scotia. The English common law as modified by statute is in force, so far as applicable, in all of Canada except Quebec. With exceptions which need not be detailed, the common law of England is substantially in force in all of the United States outside of Louisiana, where the French law, as modified by statute, still persists as in Quebec.

This fact illustrates what cannot be too strongly emphasized, namely, that the fundamental ideas of justice of the English-speaking peoples are historically and essentially identical. It is largely on this fortunate identity that the solidarity of the English-speaking peoples—the best security for the only real peace, that founded on ordered liberty and organized justice, or, in other words, on "The Reign of Law," is firmly based.

Such a celebration as the learned Judge advocates would therefore be useful as well as instructive and pleasant. Representatives of the United States in general and of Virginia in particular should be present. Some of the greatest Jurists this continent has produced, of whom it is only necessary to mention Chief Justice Marshall, were Virginians. The high traditions of this State are being maintained by the Virginia Bar.

On the Bench in Virginia are several "eminent Jurists of repute." The present Attorney-General, Col. T. W. Shelton, is a brilliant lawyer and Chairman of one of the important Committees of the American Bar Association. This particular Committee, which includes Ex-President Taft, has done much hard and useful work.

Mr. Shelton is the author of an excellent book on "The Spirit of the Courts," which everyone concerned in the administration of justice should study.

Mr. J. W. Davis, another Virginian, was Solicitor-General of the United States, until he was appointed American Ambassador at St. James, where he worthily fills the position formerly held by great men like the illustrious Choate.

J. MURRAY CLARK.

Toronto.

THE COMPANIES ACT.

With Special Reference to The Bonanza Creek Mining Company Case.[1]

No apology need be offered in submitting for your attention a most abstruse and complicated question of company law. I have had the pleasure of many opportunities of addressing accountants on similar subjects and always found that a discussion of company law and practice, however involved, was fully appreciated by members of the Association of Chartered Accountants. I may add that the appreciation of accountants upon this subject is even greater than that of an average body of lawyers. Accountants generally and lawyers exceptionally deal with company matters. If an apology is required, it should be given to their Lordships of the Appellate Division of the Supreme Court of Ontario. The observations and conclusions to be submitted to you are in direct conflict with the judgment of that tribunal.

The criticisms of judges has, of late, been a rather notorious affair; in fact many of these criticisms descended to personal attacks upon the judges. This is very regrettable, as it is unnecessary, and has a tendency to promote disrespect not only of judges but of the law. Nevertheless, judges frequently err in their opinions, and as a question of vital importance to the business community is involved in the judgment referred to, the opinions of the judges should be discussed. Moreover, the judgment in question is of a tribunal of the Province of Ontario. The subject has not been before the Courts of the Province of Quebec or any other Province of the Dominion, and for that reason it is eminently proper to be discussed in the Province of Quebec.

[1] An address delivered before the late Convention of the Dominion Association of Chartered Accountants, at Montreal, by Mr. Thomas Mulvey, K.C., Under-Secretary of State.

prise where no limitation of the business of the company was provided, and the directors could use capital of the company as they saw fit.

I propose submitting for your consideration some arguments from which it may appear that the conclusion of the Ontario Court is wrong in dealing with the effect of the decision in the *Bonanza Creek Mining Company case.* In order to develop this argument satisfactorily, it is necessary first to consider, so far as we can, the nature of a common law company and the methods which such a company followed in carrying on its business; secondly, the history and purpose of the object clause of the charter; thirdly, the decision of the Exchequer Chamber in *Riche* v. *Ashbury Railway Carriage Company;* fourthly, the conclusions of the Judicial Committee of the Privy Council in the *Bonanza Creek Mining Company case,* and then to apply these conclusions to the judgment in *Edwards* v. *Blackmore.*

The idea of a company is not modern. It can be traced back to the time of the Roman Republic. Companies were then incorporated to farm out the revenues of various conquered provinces. It might be interesting to dwell upon the growth and development of the company idea, but it is unnecessary for our purpose. The *Bonanza Creek Mining Company case* and the amendment of the *Ontario Companies Act* referred to, attribute to companies the general capacity which the common law ordinarily attaches to corporations created by charter, and it will be necessary to study only the common law or the chartered company of England. There is some difficulty in this. The old books and the old cases throw very little light upon the internal management of such companies. A few of the old cases relate to the authority to pass by-laws and to the transmission of shares, but the bulk of litigation relating to common law companies deals with questions which now come under the head of municipal law. The towns and boroughs of England were created by common law charters. With respect to these there was a great deal of litigation, but the judgments cast very

little light upon the methods and management of trading corporations.

The history of many common law companies established for the purpose of trade such as the Russia Company, the Ginny and Binny Company, the East India Company, the Hudson's Bay Company, and many others that might be mentioned, deals more particularly with the development of their trade than with their methods of management. There is, however, one pertinent fact shown in these histories, that it was not until almost the end of the 17th century that these trading companies had a fixed capital. It was usual that the members, or adventurers, as they were called, would subscribe capital for each venture, and the profits, together with the capital, were returned on the conclusion of the adventure. In the case of the East India Company, from the year 1601 to 1613 capital was subscribed for each voyage, and the profits of each were divided, together with the subscription. The first joint stock was subscribed in 1613 and the fourth in 1642. The inference to be drawn from this is that the company in each case went back to the shareholders or members for the purpose of obtaining authority and the capital to carry out each voyage.

The control of shareholders or members of the common law company is perhaps more particularly shown in the methods of passing by-laws. The directors or governors of these companies had no right to pass by-laws. The members alone had authority to pass by-laws.

These two instances bring out clearly the difference in the control and management of common law companies and the ordinary modern company, and indicate that modern methods should not be adopted in the management of common law companies without investigation. Under the Dominion and Ontario Acts it is the directors who pass by-laws and administer the capital once it has been subscribed. The control of the modern company under the Companies Acts is more

largely in the hands of directors. In the common law company the shareholders had larger control and they are the ultimate seat of authority as undoubtedly they are in the modern company, but they are reached through different machinery.

There is no question whatever but that the capacity of a common law company was unlimited, and that there was no restriction on the nature of the business which such a company could carry on. The doctrine of *ultra vires* had no application. The statement that a common law company "has the capacity of a natural person to acquire powers and rights" can have no application in considering the methods by which such a company may carry on its business. This is clearly shown by the settled principle that a company can carry on business only by agents. A natural person is under no such limitation. The question now for consideration is how that capacity must be exercised. While the *Bonanza Creek Mining Company case* decided that the capacity of a company under the Act is unlimited, that judgment makes no reference whatever to the method by which that capacity may be brought into play. It makes no mention of the authority of the directors, whether and how they are limited. The *Edwards* v. *Blackmore case,* however, goes much further and in effect holds that neither the capacity of the company, nor the capacity of directors on behalf of the company, is subject to any limitations and that the usual purpose or object clause may be disregarded.

This raises for consideration the purpose and effect of the object clause of the charter of a company. Considerable light is thrown on the subject by an historical study of the growth of the clause. No book or treatise on this history is available, and a study of the details and a comparison of object clauses are of great difficulty in Canada where the original papers are not accessible. Such material, however, as is available is sufficient to give some light on the development of the subject. In the common law charters very meagre

references to the purposes or objects of the corporation were set out. The object clause of the Hudson Bay's charter covers only a few lines. The purposes or objects in the Sutton Hospital are set out in the decision in that case and cover only a few lines. This appears to be the case with all common law corporations to which reference can be made.

In the year 1720, the statute known as the *Bubble Act* was passed. This statute, while it did not prohibit the incorporation of companies, made such difficulties for them that their creation was practically stopped. The *Bubble Act* prohibited trading under obsolete or forfeited charters for purposes not allowed in their charters and also prohibited business being carried on without charters. The *Bubble Act* was passed after the carnival of speculation in the early years of the 18th century, more particularly in the shares of the South Sea Company. It was drastic legislation and remained in existence for one hundred and five years. Corporate trading was hampered, but it could not be suppressed, as it is shown, by the history of commerce in England, to be the natural and efficient method of carrying on business. The Act, however, was evaded by the creation of partnerships with large numbers of partners and with elaborate machinery for the conduct of business and a description of the nature of the business to be carried on. It is in this that we have the origin of the purpose and object clause of modern charters. The deed of settlement, as it was called, set out precisely the nature of the business the managing partners could carry on. The well known principle of partnership law that a partner cannot bind another, except in a transaction within the partnership articles, was, in fact, the basis of the deed of settlement. The early company legislation of the 19th century was mainly directed at regulating partnerships of this kind and facilitating the means by which they might carry on business and conduct litigation. Later on the legislation developed

through provisions for registration, and finally in the Act of 1862.

This history casts some light not only upon the subject of the objects and powers set out in the memorandum, but also upon the legal principles which were applied in considering the memorandum of association even after the year 1862. Lord Justice Blackburn in the *Ashbury Railway Carriage Company case* appears to have that well in mind because he considers the Ashbury Railway Carriage Company practically as a partnership, and he applies the rule of construction of partnership articles in indicating that it is necessary that every shareholder should approve of a contract which is beyond the purposes and objects set out in the charter.

It is a matter of comment that very recent common law charters have all the detailed provisions respecting purposes and objects which are usually found in the memorandum of association of the ordinary company. The British South Africa Company was created by common law charter in the year 1889. The charter itself provided purposes or objects in fifteen numbered sections. Moreover, it provided that within a year there should be executed by the then shareholders a deed of settlement more clearly defining the purposes and objects of the company. This deed of settlement was filed in the year 1891, and the purpose and objects cover many sections. These objects and purposes could not be for the purpose of limiting the capacity of the company, and it is reasonable to suppose that they were introduced for the purpose of limiting the authority of the directors.

Such appears to be the history of the purpose or object clause in England, and it should be kept well in mind in considering the application of English case law in Canada. In the early part of the 19th century Canadian inspiration in company law came not from England but from the United States. The partnership idea of business companies was not developed here.

United States company law is much more a development of the common law or chartered company of England.

The question of the capacity of directors was not raised or passed upon either in *Riche v. Ashbury Carriage Company* or in the *Bonanza Creek Mining Company case,* but there are references in both these cases indirectly bearing upon the subject which may be fruitful in indicating the views of the Courts in these decisions, and for that reason it is necessary to consider the facts and the circumstances of these cases.

The facts of the *Riche v. Ashbury Railway Carriage Company case* are as follows: The Ashbury Railway Carriage Company was incorporated for the purpose of manufacturing cars, coaches and railway equipment, and carried on an extensive business in England. The company had dealings with Belgian and Spanish railway companies, and the directors entered into a contract to acquire a concession for the construction and operation of a railroad in Belgium. The plaintiff, Riche, in the case brought an action for damages for breach of this contract. A case stated for the opinion of the Court was in the Exchequer Court and on appeal in the Exchequer Chamber. The judgment of Lord Justice Blackburn in the Exchequer Chamber is of the greatest interest; in fact, as pointed out later on, it was largely on the views which Lord Justice Blackburn expressed in this case that the *Bonanza Creek Mining Company case* turned. It may be that the views expressed would not be followed in their entirety at the present time, nevertheless, they are pertinent for the purposes of considering the principles underlying the decision. For instance, Lord Justice Blackburn states as follows:—

"Up to a certain extent I believe there is no doubt as to the effect of the incorporation of a company under the Companies Act of 1862. The company is a corporation, and it is a partnership for trading purposes, for the objects for which the company is established. And by the articles in this case, as in almost all others, the management of the company's business is confided

exclusively to a board of directors. And I apprehend that it is clear that this board have the same authority to bind the company in the managing of the company's business that a partner or manager in an ordinary partnership, established at common law for the same objects, would have to bind the firm; an authority which to be valid must be exercised in cases within the scope of the ordinary business and transactions of the firm. If the board in a joint stock company, or a partner in a common law partnership, make a contract beyond their authority, it does not bind the company in the one case, or the firm in the other."

At the time this judgment was given, company law was in process of development. Many of the ideas formerly held that a company was merely a quasi partnership still persisted. Moreover, the learned judge after discussing the facts of the case went on to consider whether a corporation as distinguished from a partnership could carry out transactions not expressly authorized by the charter. There is no doubt, of course, of the correctness of the statement that the agency which is created by a partnership authorizes each partner to bind the partnership to the extent of the business referred to in the partnership articles. In transactions beyond that the partnership is not bound unless each individual partner concurs and consents to the particular contract.

In analyzing the corresponding proposition with respect to corporations, the learned judge discusses at length the *Sutton Hospital case,* which was decided in the year 1612. The effect of that decision is that corporations created by charter, common law companies, are not limited in any respect regarding the business which they may carry on; in fact they may carry on the business of a natural person. Due weight must be given to the concluding words of Lord Blackburn's judgment:—

"I do not see any risk of a company practically carrying on business for other objects than those named in the memorandum. The difficulty of obtaining the assent of all shareholders, and of proving that it had been obtained, is so great that no sensible man would trust to that and deal with the company on those terms. And I think, for the reasons I have above given, that in this case the unanimous shareholders have in fact assented to the ratification

under the seal of the company of this contract; and that such ratification, at all events, makes the contract binding on the company in its corporate capacity."

The essential basis of Lord Justice Blackburn's decision is that the contract in question received the unanimous approval of the shareholders. There is no doubt that in coming to this conclusion he had in mind the partnership rule that the assent of all partners is necessary to bind a partnership.

Other considerations apply to a company under the *Dominion Companies Act.* Section 30 of the *Interpretation Act,* Chapter I. of the Revised Statutes of Canada, which was first enacted in the year 1849, vests in the majority of the members of a corporation the power to bind the others. The assent of the mere majority of the shareholders at a general meeting called for considering the contract would have been sufficient for the purpose of binding the company as Lord Justice Blackburn held the Ashbury Railway Carriage Company to be bound.

The judgment of Lord Justice Blackburn and also the judgments of the Members of the House of Lords on an appeal from the Exchequer Chamber were very fully dealt with in the argument of the *Bonanza Creek Mining Company case* before the Judicial Committee of the Privy Council. While that argument may not be adduced before the Judicial Committee of the Privy Council as an argument in another case and may not be referred to as binding the members of the Committee, nevertheless the discussion which took place respecting this judgment is pertinent for the purposes of indicating what their lordships had in mind in deciding the *Bonanza Creek Mining Company case* as they did. It is unnecessary to repeat any portion of the very lengthy argument which took place. It is fair to say that that argument shows that their lordships held that the Bonanza Creek Mining Company, Limited, was the kind of company which Lord Justice Blackburn held the Ashbury Carriage Company to be in his judgment in the Exchequer Chamber.

The next step in the argument is to consider the precise decision in the *Bonanza Creek Mining Company case.* The facts are as follows: The Bonanza Creek Mining Company, Limited, was incorporated under the *Ontario Companies Act* for the purpose of carrying on a mining business. There was no limitation upon the area of the operations of the company, and it commenced business in the Yukon. A license under the *Foreign Corporations Act* was issued by the Commissioner of the Yukon Territory. Free mining licenses were also granted to the company. The Department of the Interior also entered into contracts with the company respecting certain mining leases. The action was brought for breach of these contracts, and on a fiat being granted, the Crown raised the defence that it was not competent for the company to carry on business outside the Province of Ontario. This issue brought in question the capacity of provincial companies to carry on business outside the incorporating province, which was long standing. The provinces under the *British North America Act,* section 92, paragraph 10, are authorized to incorporate companies with provincial objects. The exact significance of the words "provincial objects" was under consideration long before the *Bonanza Creek Mining Company case* was commenced; in fact, it had been under discussion since 1907, when the judges of the Supreme Court propounded certain questions to be argued in the case *Canadian Pacific Railway Company* v. *The Ottawa Fire Insurance Company,* which was then standing for judgment before the Court. There was no effective decision given in answer to these questions, and the Governor-General in Council subsequently directed certain other questions of similar effect to be submitted to the Supreme Court. These questions were twice before the Judicial Committee of the Privy Council and were argued with the *Bonanza Creek Mining Company case.* It is fair to say that the attitude of

the Crown in the *Bonanza Creek Mining Company case* was taken more for the purpose of bringing forth a decision on the question just mentioned in a concrete case. Their lordships of the Privy Council, however, appear to have considered the attitude of the Crown as harsh. Throughout the argument of the *Canadian Pacific Railway v. The Ottawa Fire Insurance Company* and the stated *Companies case*, it was never contended by Canadian counsel that companies incorporated under the Ontario or Dominion Act were common law companies. Their lordships of the Judicial Committee suggested this argument and followed it to its conclusion, apparently for the purpose of reaching a decision to their satisfaction in the *Bonanza Creek Mining Company case.* They, in effect, held that companies incorporated under these statutes are common law companies and have the capacity of a natural person. They followed the *Sutton Hospital case,* which was referred to at length in Lord Justice Blackburn's judgment and approved of his conclusions.

The judgment in the *Bonanza Creek Mining Company case* makes no reference whatever to the authority of directors. That question was not raised, in fact, it was not necessary to raise it because the transactions there involved were quite within the authority of the directors. The company was incorporated to carry on a mining business, and that was the business which was carried on in the Yukon. The leases with the Dominion Government were mining leases, and unquestionably the directors had authority to make them. The judgment in the *Bonanza Creek Mining Company case* throws no light whatever upon the authority of directors.

It is unnecessary to refer to the various decisions upon the subject, and it is quite sufficient to say that prior to the *Bonanza Creek Mining Company case* and since the time of *Ashbury Railway Carriage Company v. Riche,* it has been the settled law that the directors of a company are authorized to carry out any transaction

within the purpose or object clause in the charter. In entering into such a contract, there is no necessity to obtain the concurrence of the shareholders. The directors are clothed with authority to bind the company to the extent of such transactions. It was also the law that the company itself could not transcend the authority conferred upon it by the charter, that its powers were limited to the purposes and objects set out. The authority, therefore, of the directors and the capacity of the company were coterminous. Because the capacity of the company has been extended by the operation of the decision in the *Bonanza Creek Mining Company case,* appears to afford no reason why the authority of the directors is also extended. The argument in the *Bonanza Creek Mining Company case* and the judgment of Lord Justice Blackburn in *Riche* v. *Ashbury Carriage Company case* in the Exchequer Chamber impel one to a different view. There can be no question but that their lordships of the Judicial Committee had in mind the kind of company which Lord Blackburn had in writing his judgment, that is, a company which was not limited in its capacity to the purposes and objects set out in the charter, but could, with the concurrence of all the shareholders, enter into contracts beyond those specified in the charter.

It is not a criticism of Lord Blackburn's judgment to say that it is not applicable to a Canadian company, because by the *Interpretation Act* all the shareholders are not required to concur in acts which bind the company. Lord Blackburn had in mind a corporate partnership and not a company under the Dominion Act in writing his judgment. Nevertheless, the substantial principle involved is applicable, that in transactions beyond the purposes and objects set out in a charter the concurrence of the majority of the shareholders is required.

Having set out in a fairly superficial way the arguments upon the subject, it is now necessary to go more minutely into the judgments referred to, so that it will

be seen that the conclusions which have been indicated are fully brought out by these decisions. In the *Bonanza Creek Gold Mining Company case* the Lord Chancellor states as follows:—

"For the company it is said, is a pure creature of statute, existing only for objects prescribed by the legislature within the area of its authority, and is, therefore, restricted so far as legal capacity is concerned, on the principle laid down in *Ashbury Carriage Company v. Riche*, L. R. 7 H. L. 653."

This case has, since 1875, been a leading decision upon questions of company law. It laid down the doctrine of *ultra vires* and held that a company incorporated under the Companies Act of the United Kingdom, 1862, was a statutory company and that such a company had no capacity to enter into any transaction beyond those set out in the memorandum of association, which is equivalent to the Letters Patent of a company incorporated under the Dominion Act. It is a matter of comment that this decision in the House of Lords reverses the decisions in the Exchequer Chamber upon which the Judicial Committee relied in coming to their conclusion in the Bonanza Creek Mining Company.

Their lordships go on to comment upon the effect of the decision just referred to, as follows:—

"Their lordships, however, take the view that this principle amounts to no more than that the words employed to which a corporation owes its legal existence must have their natural meaning, whatever that may be. The words of the *British Companies Act* were construed as importing that a company incorporated by the statutory Memorandum of Association which the Act prescribes could have no legal existence beyond such as was required for the particular objects of incorporation to which that memorandum limited it. A similar rule has been laid down as regards companies created by special Act. The doctrine means simply that it is wrong, in answering the question what powers the corporation possesses when incorporated exclusively by statute, to start by assuming that the legislature meant to create a company with a capacity resembling that of a natural person, such as a corporation created by charter would have at common law and then to ask whether there are words in the statute which take away the incidents of such a corporation. This was held by the House of Lords to be the error into which Blackburn, J., and the judges who agreed with him, had fallen when they decided in *Riche v. Ashbury Carriage Company*, L. R. 9 Ex. 230, in the Court below, that the analogy of the

status and powers of a corpoation created by charter as expounded in the *Sutton Hospital case*, 10 Coke, 1, should in the first instance be looked to. For to look to that analogy is to assume that the legislature has had a common law corporation in view, whereas the wording may not warrant the inference that it has done more than concern itself with its own creature. Such a creature, where its entire existence is derived from the statute, will have the incidents which the common law would attach if, but only if, the statute has by its language gone on to attach them. In the absence of such language they are excluded, and, if the corporation attempts to act as though they were not, it is doing what is *ultra vires* and so prohibited as lying outside its existence in contemplation of law. The question is simply one of interpretation of the words used."

Attention must again be drawn to the important distinction which the Judicial Committee of the Privy Council has drawn between the judgments of the House of Lords and that of the Exchequer Chamber in *Riche v. Ashbury Carriage Company*. While the Committee approves and follows the judgment of the House of Lords so far as English companies are concerned, this judgment is not followed as applicable to Canadian companies. The judgment of the Exchequer Chamber is followed with respect to Canadian companies, although it was overruled in the House of Lords in its application to British companies.

Their lordships in the Judicial Committee in this judgment have held that a company incorporated under either the Dominion or the Ontario *Companies Acts* is not solely attributable to these statutes; that, in fact, a prerogative right of the Crown to incorporate companies rested in the Governor-General as regards the Dominion and the Lieutenant-Governor as regards the Province of Ontario. A common law company or chartered company was established by the prerogative of the Crown; in fact, it is ancient law that corporations could be created only by the sovereign authority. The difference, therefore, appears to be that the chartered company which may carry on business as a natural person would, is created under prerogative of the Crown, and the company with limited capacity has its origin in the statute which creates it. Such a com-

pany is limited to the purposes and objects which are expressly set out, the chartered or common law company having no such limitation. The effect of the decision is that companies incorporated under the Dominion and Ontario Acts are common law companies with statutory limitations; that is, the method with which they may carry on their business is regulated by statute. Their methods of holding meetings, passing by-laws and carrying on other similar transactions are regulated by statute and not by the common law, as the chartered or common company is.

In further explanation of this, their lordships proceed:—

"For the statute may be so framed that executive power to incorporate by charter, independently of the statute itself, which some authority, such as a Lieutenant-Governor, possessed before it came into operation, has been left intact. Or the statute may be in such a form that a new power to incorporate by charter has been created, directed to be exercised with a view to the attainment of, for example, merely territorial objects, but not directed in terms which confine the legal personality which the charter creates to existence for the purpose of these objects and within territorial limits. The language may be such as to show an intention to confer on the corporation the general capacity which the common law ordinarily attaches to corporations created by charter. In such a case a construction like that adopted by Blackburn, J., will be the true one."

The construction referred to is that adopted by Blackburn, J., in the judgment in *Riche v. Ashbury Carriage Company,* the judgment in Exchequer Chamber, which was in fact overruled in the House of Lords by *Ashbury Carriage Company v. Riche.* As stated the Judicial Committee of the Privy Council have adopted the reasoning of Lord Justice Blackburn in the Exchequer Chamber as applicable to a Canadian company although, as a matter of fact, that judgment was overruled in its application to a company incorporated under the British Act of 1862. The effect of the decision is that that judgment is a good judgment as applied to a company under the Dominion or the Ontario Companies Act, but it is not applicable to a company under the *Companies Act 1862.*

Some further insight into the subject may be obtained in comparing pertinent remarks in both these judgments with regard to the authority of directors and the capacity of companies. Lord Chancellor Cairns in the House of Lords says as follows:—

"With regard, therefore, to the memorandum of association, if you find anything which goes beyond that memorandum, or is not warranted by it, the question will arise whether that which is so done is *ultra vires*, not only of the directors of the company, but of the company itself. With regard to the articles of association, if you find anything which, still keeping within the memorandum of association, is a violation of the articles of the association, or in excess of them, the question will arise whether that is anything more than an act *extra vires* the directors, but *intra vires* the company."

This indicates that for all purposes and under all circumstances the authority of the directors and the capacity of the company may not be coterminous and these respective capacities is a matter for investigation in each case.

"But, my Lords, if the shareholders of this company could not *ab ante* have authorized a contract of this kind to be made, how could they subsequently sanction the contract after it had, in point of fact, been made. I endeavoured to follow as accurately as I could the very able argument of Mr. Benjamin at your Lordships' Bar on this point; but it appeared to me that this was a difficulty with which he was entirely unable to grapple. He endeavoured to contend that when the shareholders had found that something had been done by the directors which ought not to have been done, they might be authorized to make the best they could of a difficulty into which they had thus been thrown, and therefrom might be deemed to possess power to sanction the contract being proceeded with. My Lords, I am unable to adopt that suggestion. It appears to me that it would be perfectly fatal to the whole scheme of legislation to which I have referred if you were to hold that, in the first place, directors might do that which even the whole company could not do, and that then the shareholders finding out what had been done, could sanction, subsequently, what they could not antecedently have authorized."

Lord Cairns here deals pointedly with the ground on which the judgment of Blackburn, L.J., was disapproved of by the House of Lords. The judgment of the Judicial Committee of the Privy Council in the *Bonanza Creek Mining Company case* reverses this

with respect to Canadian companies and a conclusion directly opposite to that of Lord Carins is the one which should be adopted. When the directors have entered into a contract beyond their authority the shareholders may approve and make it binding.

You will notice that their lordships of the Privy Council have stated that a construction like that adopted by Lord Justice Blackburn is the true one. It is necessary, therefore, to refer again to the facts of *Riche v. Ashbury Carriage Company* as dealt with in the Exchequer Chamber, and the conclusions arrived at by Lord Justice Blackburn. There is no question but that the contract in question was beyond the purposes or object of the company as set out in the memorandum of association. The contract was entered into by the directors without the concurrence of the shareholders, and litigation was subsequently commenced. Thereafter a compromise was arranged in which the shareholders at a general meeting approved of the action of the directors. The Lord Chancellor in the House of Lords questions this statement of fact, but these are the facts which Lord Justice Blackburn found and upon which he based his judgment. It was the approval of the shareholders of the particular contract which forms the essential basis of Lord Justice Blackburn's judgment. The *Sutton Hospital case* is followed. There is no question of this decision. It was given in the year 1612 and has been followed in many cases. It holds that a corporation created by Royal Charter is not restricted in any way in the business it may carry on, and this whether the purposes or objects of the corporation may be set out in the charter or not. The judgment holds that such reference to purposes or objects is not any limitation of the capacity of the corporation, but in the nature of what may be termed a *quasi* contract between the corporation and the Crown. If the corporation extends its operations

beyond what is set out in the charter, or otherwise infringes upon these terms, then grounds may be given for the cancellation of the charter by the Crown, and that is the only effect of a corporation entered into a contract beyond the purposes or object set out in the charter.

Having, therefore, in mind the clear statement of their lordships of the Judicial Committee that the construction laid down by Lord Justice Blackburn was the true one, there appears to be no doubt but that, when their lordships decided that a Canadian company was a common law company, they had before them considerations of the capacity of the kind of company Blackburn, L.J., had in mind, and made no reference to and dealt in no way with the authority of the directors, and if we go to the judgment of Lord Justice Blackburn we find that in adopting his construction the authority of directors is clearly dealt with, and it is held that in matters beyond the purposes or objects set out in the charter the directors must go to the shareholders for authority.

Dealing now with the case of *Edwards v. Blackmore,* which I have referred to, the decision appears to rest upon the following statements, that a common law company had almost unlimited capacity to contract; that statements in the charter defining the objects do not take away the unlimited capacity; that even express restrictions in the charter do not limit the capacity of the company, but raise questions to be dealt with between the Crown and the company. These principles are all incontestable. The further grounds are needed that the contract was entered into by the directors and that it was under the seal of the company that the goods had been delivered and the contract executed, and because the President and General Manager had apparent authority to execute the contract. It is submitted for the reasons given above that these do not constitute grounds for the decision except per-

haps the delivery of the goods, which raised other considerations entirely. This decision begs the question of the authority of the directors to act in matters beyond those set out in the purposes and objects of the company. The judgment states that the President and General Manager had apparent authority to execute the contract. How that authority was apparent is not stated, and it is confidently submitted that this statement is erroneous. If the contract had been within the objects of the company, unquestionably the authority of the President and General Manager would be apparent. Moreover, the statement that as the contract was under seal of the company, it was binding, begs the question. The seal of a company renders the company binding only where the seal is attached with proper authority. A company can act only through an agent and only through an agent duly authorized for the purpose. If the agent assumes to go beyond the authority conferred, the company is not bound; in fact, it has been held that a document signed by the duly elected officers of a company and sealed with the company's seal was a forgery when it was shown that the officers signing had no authority in the matter in question.

The conclusion may be summarized:—

1. The *Bonanza Creek Mining Company case* holds that Canadian companies have the nature of common law or chartered companies, and that the purposes or objects are not limited by any statement thereof in the charter;

2. The *Bonanza Creek Mining Company case* made no reference to the authority of the directors to carry on the business of the company, but indicated in adopting the judgment of Lord Justice Blackburn in *Riche* v. *Ashbury Carriage Company* in the Exchequer Chamber the true construction to be followed;

3. The contract in question in *Riche v. Ashbury Carriage Company* was beyond the purposes or objects of the company in its memorandum of association, but was upheld by Lord Justice Blackburn because it had been unanimously approved of by the shareholders. In reaching this conclusion Blackburn, L.J., appears to have relied upon this approval and he stated that there would be no harmful consequences in such a construction because in the application of it the approval of the unanimous shareholders would always be required in entering into a contract beyond the purposes or objects set out in the memorandum of association;

4. While this construction may not be in terms applicable to a Canadian company because under the *Interpretation* Act a majority of the shareholders may bind the company, it must be considered in the application of the decision in the *Bonanza Creek Mining Company case* to Canadian companies;

5. The correct deduction to be taken from the *Bonanza Creek Mining Company case* is that while the capacity of Canadian companies is unlimited, that capacity may be exercised in matters beyond the purposes or objects set out in the charter only with the approval of a majority of the shareholders;

6. In the dealings of Canadian companies the authority of the directors is limited to the purposes or objects set out in the charter, and transactions beyond the expressed purposes or objects are not within the authority of the directors as agents of the company;

7. While the doctrine of *ultra vires* is put at an end by the *Bonanza Creek Mining Company case* in its application to the capacity of Canadian com-

panies, the case law on the subject is still applicable to the authority of the directors;

8. The case of *Edwards v. Blackmore*, while it may be upheld upon other grounds, is in error in holding that because the President and General Manager entered into the contract and affixed the seal of the company, it bound the company;

9. There was no consideration in this case of any differences in management of common law and Canadian companies, and the law formerly held applicable to the latter was taken to govern the former without any study or explanation of their essential differences;

10. The general application of the judgment in *Edwards v. Blackmore* would undermine public confidence in company management, and if it is on further consideration held to be the law, legislation should be enacted for the purpose of defining and regulating the authority of company directors.

CURRENT COMMENTARY UPON RECENT ENGLISH AND CANADIAN DECISIONS.[1]

Bill of Exchange—Forged Bill of Lading attached thereto—Presentment for Acceptance by Holder in Due Course—Implied Warranty of Genuineness of Bill of Lading. [1918] 2 K. B. for December contains the long judgments of the Court of Appeal in *Guaranty Trust Co. of New York* v. *Hannay & Co.*,[2] in which the real question, as Warrington, L.J., says (p. 649) was, whether the plaintiffs, dealers in foreign bills of exchange in New York, on presenting to the defendants' bank in Liverpool for acceptance on behalf of the defendants, a draft drawn upon them by Knight, Yancey and Co., of Decatur, Alabama, accompanied by what purported to be a bill of lading of certain cotton, warranted the genuineness of the bill of lading, and were therefore liable in damages for breach of such warranty, the bill of lading having turned out to be forged, and the amount of the draft having been paid to the holders in due course. The draft had been drawn upon the Bank of Liverpool pursuant to a contract between the drawers and the defendants for the sale and purchase on credit of certain cotton.

Warrington, L.J., says (pp. 651-2):—

"I propose to deal with what I have stated above to be the real question, namely, whether under the circumstances there must be implied a warranty by the plaintiffs that the so-called bill of lading was a genuine document. There is clearly no express warranty; nor is there any express representation that the bill of lading was genuine, which, if acted on, might result in a warranty to the same effect. The defendants are driven to insist on an implied warranty. . . . I am clearly of opinion that the alleged warranty ought not to be implied. I will first consider the case on the

[1] The aim of the Editor is to make this feature of the C. L. T. a really complete and conscientious review of recent English decisions likely to be of use to Canadian lawyers, so that readers of it from month to month may rely on no case important for them to be advised of, escaping their notice. Cases under the English *Workmen's Compensation Act, 1906*, are not considered as coming under this category.

[2] [1918] 2 K. B. 623.

assumption that the draft was a bill of exchange in the proper sense, *i.e.*, a negotiable instrument. The plaintiffs receive from the drawer the bill of exchange with the bill of lading attached. They are the indorsees of the bill, and have become so for value and in due course. They then present the bill to the drawee for acceptance. The consideration for the acceptance moves from the drawer to the acceptor, not from the indorsee, even in a case in which the indorsee requests the drawee to accept. That is to say, the drawee accepts the bill, not in performance of any new engagement made between him and the indorsee, but by virtue of the arrangement he has with the drawer. But in truth the plaintiffs did not request the bank to accept it; they only desired to know whether the bank would acknowledge the liability to do so and perform it or not, with an intimation that in the latter case a well-known step would be taken. It is quite clear that in such a case there is no warranty of the genuineness of the signature of the drawer: *East India Co.* v. *Tritton*,[3] the principle of which, though dealing directly with the signature of the indorser, applies also, with at least equal force, to that of the drawer. I can see no ground on which any such warrant should be applied as to the bill of lading. It is contended that by surrendering the bill of lading on acceptance the plaintiffs purported to transfer the property represented by it to the acceptors, and that it must be taken that they warranted the existence of such property and that the bill of lading represented it. The answer is, that the indorsee of a bill of exchange with the bill of lading attached obtains a special property only in the goods defeasible upon acceptance, and in that event the property in the goods passes, not by virtue of the surrender to the acceptor of the bill of lading, but by virtue of the contract between the drawer as vendor of the goods and the acceptor as the purchaser thereof: *Mirabita* v. *Imperial Ottoman Bank*.[4] The bill of lading is surrendered, not by virtue of any contractual obligation between the indorsee and the drawee, but by virtue of the obligation he assumed towards the drawer. Under such circumstances I can see no room for any implication of warranty as to the genuineness of the bill of lading. I have so far considered the question as if there were no direct authority on the point. But this is by no means the case. The precise question was decided by Malins, V.C., in *Leather* v. *Simpson*.[5] This case has been known to the profession since 1871, it has been treated in text-books as expressing the law, it has never been questioned, and in America, at all events, there are many cases reported in which it has been followed. . . In my opinion, therefore, if the draft be a bill of exchange, there is no such warranty as alleged. But suppose it be not, that is to say, suppose that it is a conditional order to pay and, therefore not negotiable, and suppose the condition be that the bill of lading is

[3] 3 B. & C. 280, 289.
[4] (1878) 3 Ex. D. 164.
[5] L. R. 11 Eq. 398.

genuine and that the goods have been shipped, with all respect to the learned Judge (Bailhache, J.) and others who seem to have assumed that this would bring about a different result, I really fail to see how it would affect the question. The consequences of non-negotiability would be that the holder would be in the position of an ordinary assignee holding subject to any equities between the parties to the original contract, and if the drawer could not require payment unless he gave the acceptor the goods, the holder could not do so either, but this is not a circumstance leading to the inference of an implied warranty that the drawer has performed or will perform his obligation; if anything there is less ground for implying the warranty in the case now under consideration than in the case of a negotiable instrument, inasmuch as the acceptor is in a stronger position as regards the holder than if the draft were negotiable, for he is not bound to pay even a *bona fide* holder if the drawer's contract with himself is broken. The result is that the plaintiffs are not in my opinion under any liability to the defendants."

Pickford, and Scrutton, L.JJ., also deliver long judgments but space forbids making similar extracts, but all agree that the plaintiffs did not, by presenting the bill of exchange for acceptance, warrant or represent the bill of lading to be genuine, and that the defendants were not entitled to recover back the money paid to the plaintiffs.

Practice — Relief against Crown — Declaratory Judgment against Crown. The effect of *Hosier Brothers* v. *Earl of Derby, Secretary of State for War*[6], *may* be given concisely thus,—in words of Swinfen Eady, M.R., with whom Scrutton and Duke, L.JJ., concurred, —an action can no more be brought against a servant of the Crown for a declaration as to what a contract, entered into with him as such servant of the Crown, means, than it can be brought for a substantive remedy on the contract itself.

Defamation — Privilege — Publication to Clerks. *Roff* v. *British and French Chemical Manufacturing Co. and Gibson*,[7] is another decision of the Court of Appeal, confirmatory of the previous decision of the

[6] [1918] 2 K. B. 671.
[7] [1918] 2 K. B. 677; 87 L. J. (K.B.) 996.

Court in *Edmondson* v. *Birch & Co.*,[8] that when you have a privileged occasion,—such as a letter objecting to a certain person being appointed arbitrator with reference to a commercial transaction between the parties,—the fact that in making the communication on such privileged occasion in the reasonable and usual business manner, having regard to its subject matter, you bring it before clerks or other subordinates, either your own or those of the receiver of it, does not destroy the privilege.

Action for damages against agent for publishing a libellous communication made to him by principal. In *Weld-Blundell* v. *Stephens*[9] we have what is constantly becoming rarer, a case of first impression. The plaintiff having retained the defendant, a chartered accountant, to investigate the affairs of a company in which he had a pecuniary interest, wrote him statements of a libellous character against the manager of the company and two other persons. The defendant handed it to his partner to attend to the matter, who carelessly left it on the table of the manager, and thus the two other persons libelled in it became aware of its contents and brought libel actions against the plaintiff, and recovered damages, as the jury found malice. Thereupon the plaintiff brought this action against the defendant for breach of an implied term of the contract of employment, viz., to keep the letter in question secret. The jury found that it was the defendant's duty to keep the letter secret, and that he had neglected this duty, and the verdicts for damages for libel were the natural consequence, and they awarded the plaintiff damages. The action now came up on further consideration before Darling, J., who says it raises a new question and one which he finds it difficult confidently to decide. Finally he decides, in the first place, that our law does not, and cannot imply, any such promise

[8] [1907] 1 K. B. 371.
[9] [1918] 2 K. B. 742.

or term as to keeping the contents of the libellous letter secret, as the plaintiff alleged, and that, therefore, no breach of contract or dereliction of duty was committed by the defendant; and, secondly, that one cannot recover damages against another because he has had to make reparation for a wrongful act committed by himself. He says (p. 748):—

> "Should it appear hard that a man may not write frankly to his confidential agent, or solicitor, when to expound his own case may necessitate publishing a libel on another, I think the answer is that he is protected by the occasion, unless he abuses his privilege, and loses it by his malice—a wrong to his neighbour against the consequences of which no law should allow him to protect himself by any contract, either express or implied. The Roman law boldly declared '*pacta quae turpem causam continent non sunt observanda.*' As for the agent, or solicitor, who had disclosed the document, he might or might not be made amenable to the person libelled according as he had or had not made the disclosure on a privileged occasion, and without malice on his part."

Arbitration—Award—Alternative Form. It will be sufficient to mention *In re An Arbitration between Olympia Oil and Cake Co. Ltd. and MacAdam, Moreland and Co.*,[10] in the words of the head-note. An award of arbitrators was made in an alternative form, first, in that of a special case under sec. 7 (b) of *The Arbitration Act, 1889* (*cf.* R. S. O. 1914, c. 65, s. 10), if either party should give to the other 14 days' written notice of his desire to take the opinion of the Court, and should within 14 days from the service of such notice set the award down for argument before the Court as a special case: and, secondly, in the form of a final award if the above-mentioned notice was not given and the case was not set down for hearing within the prescribed time. It was held by Bankes and Scrutton, L.JJ., Pickford, L.J., dissenting, that the arbitrators had not exceeded their jurisdiction in making their award in that form, and that the award was not bad on its face.

[10] [1918] 2 K. B. 771.

Landlord and Tenant—Letting of Premises in separate Rooms—Common Flight of Steps—Obligation of Lessor as to Safety of Steps. In *Dunster* v. *Holles*,[11] again, the question what was the correct legal principle to be applied to the facts of the case was by no means easy. The plaintiff was the tenant of two rooms at the top of a three-storied house in Hoxton, and the defendant was the plaintiff's landlord. The defendant let other rooms in the same house to other tenants. There was a common staircase and there was a common flight of steps, about six or seven in number, leading from the ground floor to the street. The staircase and steps were not part of the subject-matter of the demise to any of the tenants and were retained under the control of the defendants, but were intended for the use of all the tenants and of persons who had occasion to visit the tenants. The steps leading to the street were very old and inconvenient and were less than a foot wide, and they slanted downwards towards the street. The plaintiff had noticed that these steps were out of repair. They had been coated with cement some years before the present action, but the cement on the two lowest steps had given way. When the plaintiff was walking down the steps he tripped and fell at the lowest step by one. He fell on his leg and the accident turned out to be serious, and he brought the present action against his landlord for damages for personal injuries. The action came up before Lush, J., without a jury, who gave judgment for the plaintiff. He carefully reviews the decided cases, and comes to the following conclusions as to the law:—

"It was said in *Miller* v. *Hancock*,[12] that there was an implied obligation on the lessor to keep the common access to the premises in a safe condition. I take that to be a contractual obligation. It appears to me to be impossible to hold otherwise. A lessor who lets rooms to a tenant and provides a common staircase which the tenant must use must come under an implied contractual obligation to keep the access in a reasonably safe condition, otherwise the tenant cannot enjoy the use of the rooms which he has contracted to take . . .

[11] [1918] 2 K. B. 795.
[12] [1893] 2 Q. B. 177.

In those circumstances, has the tenant first of all a right to treat the lessor as having entered into an absolute obligation to keep the staircase safe? I think not. . . . The second question, therefore, is whether the tenant has a right to sue the lessor for damages if he proves that the lessor was negligent in allowing the steps to be out of repair, even though the defect was visible and obvious. In other words, is the lessor merely under an obligation to avoid exposing the tenant to a trap or is he liable if through want of care he allows the premises to be in an unsafe condition? In my opinion the latter is the correct view. I do not see how a lessor who has impliedly undertaken to keep the access reasonably safe can avoid liability by proving that the tenant knew the steps were old, worn, and defective. That fact may be good ground for the conclusion that the plaintiff was guilty of contributory negligence, but I must hold that that in itself affords no answer to the action."

Hire-purchase Agreement — Option to Purchase — Sale by Hirer. It is a somewhat heavy task to review the cases in this thick number of [1918] 2 K. B. The next one requiring notice is *Whitely, Ld.* v. *Hilt*,[12a] reversing the judgment of the Divisional Court referred to *supra* pp. 591-2, where the facts are set out, to which the reader may be referred. The Court of Appeal had held that after all the County Court Judge was right in his view that the defendant had acquired the rights of the hirer under the agreement before anything had been done to terminate it, no instalment being then in arrear, that the measure of damages was the amount of the unpaid instalments, and that the plaintiffs were not entitled to recover the piano or its full value, but only the amount paid into Court.

Swinfen Eady, M.R., says (p. 817):—

"The whole terms of the agreement show that the contract was not merely a bailment for reward, but that it conferred on the bailee an interest in the chattel. It did not amount to a contract for sale, as the hirer was not bound to purchase. But it did confer on the hirer an absolute right to purchase on complying with the provisions of the agreement. The contract was in my opinion assignable by the hirer, but the assignee could only retain possession of the chattel upon the terms of the contract. There was no right to remove the piano from the flat, nor has it been removed. There is no reason whatever for supposing that any personal element entered into the mind of either of the parties to the agree-

[12a] [1918] 2 K. B. 808.

ment, or that it would make any difference to the plaintiff by whom the obligations of the contract were fulfilled, or that there were any grounds for taking this contract out of the well-settled general rule that the benefit of a contract is assignable in equity and may be enforced by the assignee . . . The defendant therefore acquired all the interests of the vendor, and moreover she had the right in equity to compel the vendor to pay the remaining instalments to the plaintiffs and enforce for the benefit of the defendant all rights conferred by clause (e) of the contract."

Clause (c) provided that if default was made in payment of the instalments, or if for any other breach the plaintiffs retook possession of the chattel, the hirer's interest was not thereby terminated, but she had the right to resume the hiring, on paying the arrears of hire up to the date of repossession, and procuring a satisfactory guarantee. Warrington, and Duke, L.JJ., were of the same opinion.

In [1918] P. for December there appears to be no case requiring notice here.

Company—Debentures—Trust Deed—Right of Voting on Shares in another Company included in Trust Deed. In [1918] 2 Ch. has to be noticed *Siemens Bros. & Co.* v. *Barnes*,[18] the unanimous decision of the Court of Appeal on the following points, as stated in the headnote: (i) Where a company makes an issue of debenture stock which it secures by a debenture trust deed, and as part of the specifically mortgaged property causes shares in another company to be registered in the names of the trustees of the deed, the trustees are, in the absence of any contract restricting their rights, entitled, as the legal owner of the shares, to exercise the voting rights in respect of them in such manner as in their judgment they may deem best, irrespective of any directions of the mortgagor company as to how the voting rights should be exercised, and this, notwithstanding that the security is not yet enforceable; (ii) Where articles of association give a right to demand a poll to "members holding" at least a specified

[18] [1818] 2 Ch. 324; 87 L. J. (Ch.) 572.

number of shares, joint holders of the specified number of shares may demand a poll without the support of any other member.

The Court also held, on a motion by two shareholders, A. and B., for an order directing the company to transfer one-half of the shares standing in their joint names into the names of A. and B., and the other half into the names of B. and A., the matter was not one which ought to be dealt with on an interlocutory application. The motion is explained by the fact that Article 147 provided that:—

> 'If more persons than one are jointly entitled to a share, the person whose name stands first in the register of members, as one of the holders of the share and no other, shall be entitled to vote in respect thereof.'

Company — Winding-up — "Clerk or Servant" of Company—Preferential Payment. The only other case calling for mention in this number of [1918] 2 Ch. is *In re Ashley and Smith, Ld., Ashley* v. *The Company,*[14] a decision of Sargant, J., as to whether a certain person was a "clerk or servant" of a company—the *Sportsman,*—so as to be entitled to preferential payment on its winding-up under sec. 209, of *The Companies (Consolidation) Act, 1908.* It happened that he had been doing work for the *Sportsman* as a reporter at coursing meetings away from its place of business, and that he was not exclusively employed by it, and was only bound to do that particular class of work, and was not working under the control or subject to the commands of the *Sportsman.* Sargant, J., held that these four circumstances, and possibly the last one alone, prevented him being a "clerk or servant" so as to be entitled to such preferential payment.

[14] [1818] 2 Ch. 378.

CANADIAN DECISIONS.[15]

Insurance—Foreign Company—Waiver of forfeiture after loss. It would, probably, be wrong to pass by without a word of notice the case of *National Benefit Life and Property Ass. Co.* v. *McCoy*,[16] in the number of 57 S. C. R. for November, wherein the Supreme Court held, Anglin, J., dissenting, that the general agent for a Canadian province of a foreign (English) insurance company had authority, even after loss, to waive a forfeiture incurred through breach of a condition in the policy. The condition in question was to the effect: 'The company is not liable for loss . . . if any subsequent insurance is effected in any other company unless and until the company assents thereto.' The Court held that the appointment by the agent of an adjuster with authority to make a settlement with the assured, after becoming aware of a subsequent insurance constituted an assent on behalf of the company to such subsequent insurance, and bound the company. Anglin, J., holds that though the agent had authority before loss to assent to co-insurance, he had no such authority after loss, for this would amount to a relinquishment of an unanswerable defence to the claim of the insured, and this is not within the apparent scope of the authority of such an agent, however general that might be.

Estoppel against setting up ultra vires of a statute. In the number of 43 D. L. R. issued on Decr. 16th last, *Attorney-General for Ontario* v. *Railway Passengers Assurance Co.*[17] is one of those cases,—always interesting,—where a party was held estopped from setting up the unconstitutionality of a statute. A trust company, incorporated by Dominion authority, applied

[15] As most of our subscribers have ready access to the Canadian Reports, it is not deemed necessary to review the Canadian cases in the same detail as the English. Only those which seem of special interest and importance will, therefore, be noticed.

[16] 57 S. C. R. 29.

[17] 43 D. L. R. 344.

for, and obtained registry under the *Loan and Trust Corporations Act* of Ontario, R. S. O. 1914, c. 184, upon the trust companies' register, and as a term of receiving the same and a license to do business in Ontario accordingly, gave a bond to the Attorney-General of Ontario for the due performance of the duties of any office to which it might be appointed. The Court of Appeal here held that the company could not, in an action on the bond brought after the winding-up of the company, for balances improperly advanced set up that the provisions of the Ontario Act under which the bond was demanded and given were *ultra vires* of the province as applied to themselves being a Dominion company.

Contract of Shipment—Fixing Liability and Value —Loss of part of Shipment. In *Spaner Bros.* v. *Central Canada Express Co.*,[18] Crawford, Dist. Ct.J. (Edmonton), held, following American authority, and distinguishing some old English cases, that when a contract of shipment fixes the value of goods shipped and limits the liability of the carrier to that value, in case of a loss of part of the shipment, the shipper may recover the real value of the property lost, not exceeding the limit of liability stipulated in the contract, and is not limited to a recovery of such proportion of the amount named in the contract as the value of the property destroyed bore to the value of all the property shipped.

A. H. F. L.

[18] 43 D. L. R. 400.

CONTEMPORARY LEGAL REVIEWS AND PERIODICALS.[1]

The Harvard Law Review for December opens with four striking tributes, one by "A Siamese Student on behalf of all the Siamese Students," of Harvard, to the late Professor Jens Westengard,—

'A man equally at home and equally honoured in a New England farmhouse, a Harvard faculty-room, and a Siamese palace; a man who held noble rank in an Oriental Kingdom, who was received on friendly terms by an English Queen, who was to have occupied a distinguished position in the most august assembly ever held on earth'; (to wit, the present Peace Conference, at which he was to have sat as the representative of the Siamese government); 'yet as modest and unassuming, as simple-hearted and unspoiled as when he earned his living as stenographer in a Chicago office.'

Born in Chicago, 1871, the son of a Dane of old family, but small means, he became a stenographer in order to earn the money wherewith to go through college, and achieve his ambition of graduating from the Harvard Law School and becoming a lawyer. He was appointed Assistant Professor of Law in 1899, but in 1903 was offered and accepted the position of Assistant Adviser to the Siamese Government, becoming General Adviser after about three years: and these articles bear eloquent testimony to the skill and devotion with which he discharged these duties, and guided the fortunes of Siam, until in 1915 he resigned, and returned to Harvard as Professor of International Law, up to his recent death at a very early age. It is a remarkable career. Says Mr. Porter E. Sargent—

'As he came to exert an influence in the government second only to the King, every problem of internal administration and foreign diplomacy passed through his office. He drafted laws, made treaties, arranged foreign loans, built railroads, improved agriculture, revised the kingdom's system of finance, rearranged and classified

[1] It is by no means the intention of the C. L. T. to make this monthly feature a mere jumble of extracts. Numerous exchanges from different parts of the Empire and from the United States are examined, and attention is called, month by month, to whatever seems most striking and important in them.

the revenues, and practically did away with the opium traffic and with gambling, both of which had been a large source of revenue to the government.'

As his years of service increased, offices and honours were heaped upon him. He was, amongst other things, appointed a member of the Hague Permanent Arbitration Court. The Siamese Student very eloquently says—

'Talking with Professor Westengard, I often felt like having discovered the quiet and crystal-clear source of the stream that made our dearly beloved soil of Siam ever so fertile, and the people who live on its banks one of the happiest in the world.'

Then follows a long and interesting article on *Napoleon and His Code* by Judge C. S. Lobingier of the United States Court, Shanghai, China,—largely an outcome, obviously, of a study of the recently published volumes of the *Continental Legal History Series*. We are told how in selecting his codifiers, Napoleon proceeded to look for the ablest and most competent men in all France, disregarding all other considerations, and appointing no man because of political affiliations, nor discarding any because of personal dislike. The finished instrument contained little new law, and what there was seems to have been added largely by Napoleon himself. Between 1804 and 1896 no less than 21 countries took the Code Napoléon as their model in enacting Codes of their own. Even up to the present time no general revision but only partial amendments have been requisite.

'No greater tribute could be paid the ill-fated Corsican than the fact that now, more than a century after its promulgation, his code stands higher in the world's judgment than ever before. Napoleon himself realized that this branch of his work was to be the most enduring. At St. Helena he wrote "'My true glory is not in having won forty battles; Waterloo will blot out the memory of those victories. But nothing can blot out my Civil Code. That will live eternally."

This issue also contains an article by Henry B. Ballantine of the University of Illinois, on *Title* by *Adverse Possession*, in which the American and English decisions on the Policy and Operation of the Statutes

of Limitation, and on Privity and Tacking between Successive Holders, are exhaustively considered. The usual Notes follow, including a long one by John M. Maguire on *Naturalization of Aliens.*

The *Juridical Review* for December prints a most valuable Rhodes Lecture by Mr. W. S. Hodsworth, delivered at University College, London, on February 25th last, upon *The Relation between Commercial Legislation and National Defence historically considered.* In it is shown how one of the most characteristic features of English commercial legislation down to the close of the 17th century was the extent to which it was influenced by considerations connected with national defence, which explains much in it that later political economists, who look at its provisions from an exclusively economic or commercial point of view, too hastily condemn: that of late the needs of national defence have once more become more paramount, and such questions as the maintenance of the supply of shipping, of materials for the manufacture of munitions of war, of the food supply, and of amiable relations between employer and employed have again had to be considered from that point of view. We have returned to the point of view for the neglect of which for nearly a century we are now suffering. Space will not permit us to follow him in detail in his discussion of English commercial policy in relation to National Defence, from the 16th to the 20th Century and its results, and of the contrary policy pursued by the Germans of commercial aggression for belligerent purposes and its results; but the lessons to be learned from this history he finds to be mainly two:—

> "We must make it for ever impossible for Germany and her ally Austria to pursue this policy of belligerent commercialism, and we must set our own house in order.'

The measures which Mr. Holdsworth suggests as absolutely necessary are well worthy the attention of

our own Governments. Amongst them are the following:—

1. At all costs we must cut out the career of the German banks: no branch of these banks should be allowed in the British Empire.
2. No British or Allied insurance company should be allowed to insure or re-insure any German risk: and neutral insurance companies should be encouraged to adopt a similar policy by a refusal to do business with those who took German risks.
3. No German should be allowed to have any control over a company incorporated under the Company Acts of the British Empire, either as shareholder or director.
4. We must revive as against the Germans the disability to hold land in the British Empire, and the disability to become naturalized.
5. We must as against them revive in an altered form the Navigation Acts.

This must suffice. We hope the Article will be carefully studied in the proper quarters.

This number of the *Juridical Review* contains also an article on *German Left-handed Marriage* by A. Francis Stewart, in which he tells us about 'one of the peculiarly Teutonic things one hopes the war will alter and end, namely, 'the prerogative of the High Born, which makes them so noble that they cannot contract complete marriage except with people of equal birth,' a doctrine which, though abandoned in the lower nobility, is still in full swing among the Sovereigns and princely families in Europe. Incidentally the writer explains the most probable derivation of the term "morganatic marriage," as *Morgengabe,* or "morning gift" of the 6th century, whence marriage *ad morganaticam* to signify a union by which the wife and children that may be born are entitled to no share in the husband's possessions except in that of the "morning gift" bestowed on the day of the ceremony. There is also explained that "conscience marriage" which the Lutheran Church recognized, and which to our ideas was simply legalized bigamy, under which it was almost without exception to allow princes to take a

second marriage without divorcing their first . . . invariably contracted with subjects, or inferiors in rank, really to put up with the ambiguous position.' There is a lot of tempting historical gossip in the Article on which we must not further linger.

The *Yale Law Journal* for January opens with an Article entitled *The Voting of Sovereignty in a League of Nations* by Professor Simeon E. Baldwin, of Yale, in which he discusses whether the proposed League of Nations will be entitled to be considered as in any degree invested with Sovereignty? He discusses the question, we need hardly say, very learnedly from the points of view of the historical, philosophical, and "pragmatic" schools respectively. But it seems to us, with all respect, that the only answer the plain man can give to the question is—"Certainly not in any strict sense of the word *Sovereignty,*" for "Sovereignty in a League of Nations" embodies a contradiction in terms. Whatever "Sovereignty" connotes, it certainly connotes absolute control, not necessarily of universal scope, but so far as it extends; but if the component members of the League are really subject to the absolute control of the whole body, they cease to be in the full and true political sense, "nations." You must either alter the meaning of the word "sovereignty," or else alter the meaning of the word "nation," to find sovereignty in a league of nations. Are the States of the Union independent nations? Nevertheless that is no argument at all against the project; and we heartily concur in Professor Baldwin's concluding words that 'no philosophical subtlety as to what sovereignty is should be allowed to fetter the upward course of nations.'

Other Articles are by H. W. Ballantine of the University of Illinois Law School on *Claim of Title in Adverse Possession;* and on *Judicial Regulation of Rates of Wages* by Professor Jethro Brown.

We have also received *Law Notes* for January containing discussions by Calman Mayer on *Roumania at the Peace Table* and by Otto Erickson on *A Judicial Reckoning for William Hohenzollern,* in which, as it seems to us, he reaches the root of the matter, when he says—

> 'There is no precedent for the extradition and trial of a defeated king, but every precedent presupposes a first one. The principles for its consummation exist, the ancient principles of common international law.'

Also we gratefully acknowledge receipt of issues of the *Central Law Journal,* Decr. 20th and Jan. 3rd and 10th, in the former of which Mr. Thos. W. Shelton discusses our Mr. J. Murray Clark, K.C.'s, late presidential address at the Royal Canadian Institute on the *Reign of Law,* which he terms a "splendid address," and says that "it may be taken as the Canadian view of Justice, admirably and conservatively expressed"; we congratulate Mr. Clark, who is a good friend to the CANADIAN LAW TIMES, on this highly honourable tribute; this issue of the *Central Law Journal* also contains a long article by Edson R. Sunderland, of Ann Arbor, Mich., entitled *A New Function for Courts—Declaring the Rights of Parties,*—a jurisdiction with which we are ourselves thoroughly familiar under the Judicature Act and rules. Also we gratefully acknowledge receipt of recent issues of *The Solicitors' Journal and Weekly Reporter; The Irish Law Times and Solicitors' Journal,* that for Dec. 27th containing an Article on *The Custody of Infants; The American Law Review* for Novr.-Decr.; *The Madras Law Journal,* which flatters us by some references; *The Scots Law Times; The Criminal Law Reporter* (Parvatipuram), which reproduces an interesting account of an old Bailey lawyer, George Griffith, who was stone blind, but was retained for the defence in every case whether at Assize or Quarter Sessions, being led into Court, when he would tap the man sitting next to him, and ask him to read his brief to him, an example of courage

to other poor fellows similarly afflicted: *The Michigan Law Review* for December with Articles on *Delivery and Acceptance of Deeds,* by Herbert T. Tiffany of Baltimore; *War Legislation pertaining to the Army,* by Alfred A. Gillette, of Princeton University, and *Federal Incorporation* by Myron W. Watkins of the University of Missouri: *The Harvard Law Review* for January, with what is practically a continuation of Mr. H. B. Higgins, of Melbourne, Australia,'s Article on *A New Province of Law and Order,* which appeared in November, 1915, giving the results of his experience as President of the Australian Court of Conciliation and Arbitration; also one on *Due Process of Law—To-day,* by Charles M. Hough, New York; and a continuation of the Articles by Professor Thos. Reed Powell, of Columbia University, on *Indirect Encroachment on Federal Authority by the Taxing Power of the States: The Southern Law Quarterly* for November, which has an Article by Henry Planché Dart, of New Orleans, on *The Legal Institutions of Louisiana,* and one by Professor Maurice Wormser, of Fordham University, New York, entitled *May the Courts Compel the Declaration of a Corporate Dividend?* the conclusion being in the affirmative; we regret to see a notice of suspension of publication of this Review: and *The New Jersey Law Journal* (Plainfield. N.J.).

CORRESPONDENCE.

Winnipeg, Man.,
January 4th, 1919.

The Editor,
"Canadian Law Times,"
Toronto, Canada.

FORECLOSURE OF REGISTERED LAND IN MANITOBA.

DEAR SIR.—Your issue of December, 1918, contains a very interesting article on a comparative study of foreclosure of registered land under Land Titles Acts, by James Edward Hogg of Lincoln's Inn, London, England, which I have read with great delight.

Mr. Hogg quotes sections 122 to 124 of the Manitoba *Real Property Act*, R. S. M. 1913, as the sections dealing with foreclosure. He refers to certain decisions dealing with the relative rights of the mortgagor and mortgagee of lands after foreclosure, but omits one very important case which deals with the subject, and which was decided by the Manitoba Courts in 1909-10, and finally reached the Supreme Court of Canada, and resulted in certain very drastic amendments being made to the then *Real Property Act* of Manitoba.

Section 126 of the *Real Property Act*, being chapter 148, R. S. M. 1902, was as follows:—

'Nothing contained in this Act shall take away or affect the jurisdiction of any competent Court on the ground of fraud or over contracts for the sale or other disposition of land or over equitable interests therein.'

In 1906 this section was amended by section 3 of chapter 75 of 5 & 6 Edward VII. (Manitoba), an *Act to amend the Real Property Act*, which reads as follows:—

'Section 126 of said Act is hereby amended by adding after the word "therein" in the fourth line thereof the following: "in or over mortgages, nor shall anything contained in this Act affect the right of the mortgagee to foreclosure or sale through any competent Court which right it is hereby declared may be exercised in such Court."

After that amendment was passed, in the year 1909, an action was brought by Williams against Box to redeem land under the *Real Property Act* after foreclosure proceedings had been taken pursuant to the provisions of that Act. The lands had never left the hands of the mortgagee, who had a certificate of title as the registered owner thereof. The head note of the case reads as follows (19 M. R. 560):—

'After the mortgagee of land under the Real Property Act has legally obtained a final order of foreclosure from the District Registrar under section 113 of the Act, and has had the same entered in the register as mentioned in section 114, and has obtained a certificate of title for the property, the Court has no power to open a foreclosure and allow the mortgagor in to redeem, although the circumstances are such that a final order of foreclosure made by the Court itself would be set aside and the mortgagor let in to redeem.'

From the judgment of the trial judge, the plaintiff appealed to the Court of Appeal of Manitoba, which dismissed the plaintiff's appeal. The plaintiff then appealed to the Supreme Court of Canada, which Court reversed the judgments of the two Manitoba Courts and gave judgment for the plaintiff, opening up the foreclosure and allowing her to redeem.

The decision of the Supreme Court of Canada resulted in action being taken by the Legislature of the Province of Manitoba, and in 1911 section 7 of chapter 49 of 1 Geo. V. (Man.), an "*Act to amend the Real Property Act,*" was passed, which reads as follows:—

'Section 126 of said Act as originally enacted and section 126 as amended by section 3 of chapter 75 of 5-6 Edw. VII. and section 2 of said chapter 75 are hereby repealed and hereafter the said Real Property Act shall be read as if said section and amendments had never been enacted, but this repeal shall not affect pending litigation.'

Section 108 of the *Real Property Act,* R. S. M. 1902, defines the rights of a mortgagee to be such as if the legal estate had been vested in him, and in the seventh and following lines thereof his rights are stated to be the same "rights and remedies at law and in equity as he would have had or been entitled to if the legal estate in the land or term mortgaged had been actually vested

in him, with the right in the owner of the land of quiet enjoyment of the mortgaged land until default," etc.

Section 2 of chapter 75 of 5 and 6 Edw. VII. (Man.) passed in 1906, reads as follows:—

'Section 108 of said Act is hereby amended by inserting after the word "equity" in the seventh line thereof the words "including the right to foreclose or sell through any competent court."'

The repealing of section 2 as well as section 3 of chapter 75 of 5-6 Edw. VII. by section 7 of 1 Geo. V. (1911) has been held by the profession here to have been intended to remove, and to have the effect of entirely removing, mortgages under the *Real Property Act* from the jurisdiction of the Courts, and it has been considered by the profession that after the foreclosure has once become effective under the Act and a certificate of title issued by the Registrar in the name of the mortgagee, or the person entitled to foreclosure, the foreclosure cannot be opened and the mortgagor, or his successor in title, cannot claim any further interest in the land.

Yours truly,

J. PREUDHOMME.

THE GAZETTES.

The *Canada Gazette* of January 18th contains the Royal Proclamation postponing the meeting of Parliament until February 20th.

It also contains an Order in Council of January 11th, amending the regulations relating to unlawful associations and publications by providing that no conviction for any offence under them shall be had unless the prosecution has been assented to by the Attorney-General of the province in which the offence is alleged to have been committed.

Also that except as to pending prosecutions, the punishments and penalties provided by the said regulations shall be enforced by indictment in the manner prescribed by the Criminal Code for indictable offences, provided that the jurisdiction of a magistrate

under Part XVI of the Criminal Code respecting summary trial of indictable offences, shall, with the consent of the accused, extend to any such offences.

The *British Columbia Gazette* of January 2nd republishes the despatch of Mr. Bonar Law of June 24th, 1915, containing information for the guidance of persons desiring to record:—

(*a*) Debts (including bank balances) due to British subjects from persons residing in enemy countries:

(*b*) Other property in enemy countries (including securities) belonging to British subjects;

and respecting the Foreign Claims office set up at the Foreign Office for the purpose of dealing with all claims for the settlement of which no satisfactory machinery has existed hitherto, and which are foreign in the sense that they are claims by British subjects against a foreign government or by foreign nationals against His Majesty's government.

LOCAL AND PERSONAL.

The following advocates of Quebec have been made King's Counsel: Noel Belleau, Paul Drouin, Alfred Prevost, and A. & C. Dobell; and the following of Montreal: J. A. Beaulieu, Gordon Hyde, Geo. S. McFadden, Erroll M. McDougall, W. C. Pugsley, Percy C. Ryan; also Jean Bernier, of Ottawa; Ernest Guimond of St. Hyacinthe; Jules Poisson of d'Athabasca.

The Hon. Pierre Besile Mignault, K.C., B.C.L., etc., has been appointed a Judge of the Supreme Court of Canada. He has been since 1914 a member of the International Joint High Commission to settle differences between Canada and the United States.

The two Toronto law firms of Kingstone, Symons, and Company, and Heighington and Shaver, have entered into combination under the firm name of Symons, Heighington, and Shaver, with offices in the Excelsior Life Building, 36 Toronto Street.

Colonel J. A. Cross, D.S.O., K.C., M.P.P., of Regina, was elected President, and H. C. Pope, of Moose Jaw,

Vice-President, at the annual convention of the Saskatchewan Bar Association in Saskatoon, on January 3rd last. The next convention will be held in Regina either in the last week in June, or the first week in July.

George W. Goodwin, of Sault Ste. Marie, has been appointed Crown Attorney for the District of Algoma; and Mr. Edward Arthurs of Espanola, has been appointed Police Magistrate for the Townships of Merritt and Baldwin, in that District.

William Bell, K.C., has been elected President, and T. C. Haslett, Vice-President, of the Hamilton Law Association. At the annual meeting on the 14th ult., the Association decided to erect a tablet in the law library to the memory of its members, and of the Hamilton students-at-law, who had given their lives in the war.

Mr. F. T. Congdon, K.C., of the Yukon, Nova Scotia, Saskatchewan, Alberta and British Columbia Bars, has settled in Vancouver, B.C., with offices at 539 Pender Street west, and has taken the head of the law firm of J. A. Campbell & Co., which will be known as Congdon, Campbell & Meredith. Major Elmore Meredith, who has been overseas since 1916, will shortly return to join the firm to resume the practice of law.

We regret to see the following deaths reported:—[1]

E. F. B. Johnston, K.C., of Toronto, on January 29th, in Toronto, in his 69th year.

John Turnbull Small, K.C., of Toronto, at Pinehurst, North Carolina, on January 30th, in his 66th year.

John E. S. Gannon, a member of the firm of Keith and Gannon, of Winnipeg, on January 3rd, at Winnipeg, in his 30th year.

William Emery Wilson, of Toronto, on or about January 20th, at Toronto, in his 33rd year.

[1] It is almost impossible to prevent occasional inaccuracies in the obituary column of the C. L. T. Corrections will be always gratefully received and duly recorded in our next issue.—Ed. C. L. T.

The Canadian Law Times.

VOL. XXXIX. MARCH, 1919. No. 3

BY THE WAY.

We promised in our last issue a Symposium upon the interesting and important subject of Legal Education. We can now supply two contributions to the discussion, one from an experienced teacher of law and law students, Dr. R. W. Lee, the Dean of the Law Faculty of McGill, the other from an experienced practising lawyer and counsel, Mr. G. F. Henderson, K.C., of Ottawa. Though our readers may complain that there is "a long time between drinks" in our Symposium, we must wait till April for further contributions, which, however, we have every hope of receiving by then. In the meanwhile it is very interesting to note the contrasting views of Dr. Lee and Mr. Henderson, upon which we reserve the right to comment later.

* * *

We are extremely glad to print in our Correspondence column a most excellent letter by Mr. Ernest Heaton, respecting Judge Boyd of the Toronto "Juvenile Court." Mr. Heaton is a member of the legal profession, and is well and favourably known throughout the length and breadth of Canada as the originator and editor of "Heaton's Agency." It is a generous and timely action of his to take up the cudgels on behalf of Judge Boyd. In his letter he gives voice to what very many people have been feeling that Judge Boyd is the right man in the right place, and a first rate Judge of the Juvenile Court, and has been made the victim of petty and ignorant persecution.

It is a regrettable incident that, according to the newspapers, a Canadian officer, after four years overseas with the R. A. F., ran over some one in Toronto with his automobile, through following the directions contained in the old English rhyme—

> The rule of the road is a mystery quite
> As your way you go travelling on,
> If you keep to the left, you are sure to go right,
> If you keep to the right, you go wrong.

Our version would have less snap but we suppose would have to run somewhat as follows—

> The rule of the road is the simplest quite
> If you're not of all reason bereft,
> If you keep to the right, you are sure to go right,
> If you keep to the left, you get left.

But after all there are few people who can teach the English much about horses or anything appertaining thereto. The English rule of passing on the left we have always understood arose from the greater facility of guiding horses with the whip, especially four-in-hands, if you pass on the left than if you have to pass on the right. If any of our readers know more about horses than we do, which may quite easily happen, we should be delighted to be corrected.

* * *

In another column an article in a recent issue of the *Illinois Law Review* is referred to, in which the proper criterion of nationality is discussed. It must be admitted difficulties arise in such a case as that suggested in the *New Statesman* of February 1st:—

> 'You meet a forester in the service of the German Archduke Frederic. He speaks to you in Czech. You ask him where he comes from, and discover something as follows: his father was a Jew, his mother of Slovak family. He married a Pole, and his children go to a Polish school. His mother tongue is Magyar, and if you ask him his nationality, he tells you he is a Silesian! He prefers to speak German, if it is all the same to you, and is of course in politics a loyal Austrian.'

* * *

We are much interested to notice that in the *McGill Daily* for 11th ult., in an interview granted to the "Daily" representative for law, Dr. Lee, the Dean of

the Law Faculty, announced a series of popular lectures on "Government" which will be free and open to the public.

"Another new departure," Dean Lee stated, "which the Faculty has in contemplation is to give a special course of popular lectures on 'Government,' which will be open to the public without fee. The first lecture will be given by me on 'The Government of the Empire'; following this, Professor McGoun on 'The Government of the Dominion'; then a lecture by Professor Surveyer on 'The Government of the Province'; another by Professor Howard on 'The Government of the City'; and the last lecture of the series will be delivered by Professor Mr. Justice Greenshields on 'Our Judicial Systems.'"

We have already expressed in a recent issue our own view that one of the best ways to combat any tendencies there may be in these days towards revolutionary measures is to initiate the public, even from school-days, into the secrets of Government and Law, and to familiarize all classes with fundamental legal conceptions and rules, and the reasons and justification for them, and this movement initiated by Dean Lee seems to mark, at all events, a beginning in that direction.

* * *

We notice that the *Journal of the Canadian Bankers' Association* for January has a forceful and spirited article by Mr. J. Murray Clark, K.C., of Toronto, upon the subject of *Disallowance; The Constitutional Security for Property,* which our contemporary would, in our opinion, do a public service by republishing in pamphlet form, and widely circulating especially among the members of our local legislature. The *causa causans* of the article is the recent action of Mr. Doherty in disallowing the confiscatory British Columbia legislation respecting the lands of the Esquimalt and Nanaimo Railway Company upon which we commented in our issue for May last. Mr. Clark very convincingly deals with our Federal power of disallowance in the light of its original intention, and of the absence with us of those restrictions of the powers of local legislatures which exist in the United States Constitution, and of the elements of social

upheaval and anarchy, conveniently summarized under the term Bolshevism, which are abroad at the present time. Mr. Clark well says:—

"Confiscation of property without compensation is perhaps one of the most characteristic features of the Bolshevism which has wrought such terrible disaster in Russia. Some look on Bolshevism as a new and portentous doctrine, but it is as old as thievery and murder. The phrase "the freedom of the wild ass" used many years ago by Sir Henry Maine, most aptly describes the creed held by many in Canada, as well as in Russia, and ignorantly believed by them to be modern. . . . The disallowance by the present Dominion Government of the confiscatory provincial legislation above referred to, does indicate to me that Canada has learned somewhat from the collapse of Russia.'

* * *

Mr. Justice Darling's literary instincts are as irrepressible as his jocular. The last English K. B. D. reports gives us the case of *J. Lyons & Co.* v. *Fox*, in which the Full Court decided that an enactment imposing an excise duty called an "entertainments duty," "on all payments or admission to any entertainment" as defined in the Act, had no application to a restaurant where concerts were given during and after the service of teas and dinners. Mr. Justice Darling in the course of his judgment says:—

"The practice of giving musical entertainments at restaurants is not a new one, and if it had been intended to tax this class of entertainment appropriate language for the purpose could very easily have been introduced into the Act. We have been told that the custom of having music with meals has existed for the last 30 years. That it is much older than that for Dryden's "Alexander's Feast" shows that it was the custom in very ancient times.

'Twas at the Royal feast for Persia won
By Philip's warlike son—
Timotheus placed on high
Amid the tuneful quire,
With flying fingers touch'd the lyre."

And the effect was afterwards described—an effect which the music at the appellant's restaurant may have had on the officers who went there:—

'Soothed with the sound, the King grew vain;
Fought all his battles o'er again,
And thrice he slew the slain."

* * *

Mr. Alexander Stuart, K.C., of Edmonton, Alberta, has written a forcible letter to the Morning Bulletin of

that city, respecting the existing practice of disposing of the costs of litigation. His letter is too long to reproduce in full, but the following extracts will show the line he takes. As it seems to us he has raised an important question calling for serious consideration. He says:—

The universal practice is to make the man who loses pay the penalty of the other man's costs, no matter how honest his conduct, how reasonable his grounds of action or how much support he has in the advice of counsel or in the judgment of a judge of first instance. A litigant like every other man ought to pay for services rendered to him, but if I concede that in every case where there is no division of judicial opinion the penalty of losing should be paid by the loser, I confidently affirm that it ought not to be so when judges differ in opinion on the law or other merits of the case, or there is an honest conflict on the substantial facts.

Let me cite a case where ruin came to a man on this iniquitous principle. He asserted that by misrepresentation or concealment an exhaustive burden was imposed on him and secured on his farm and he resisted its enforcement. The trial judge agreed with him. The court of appeal divided two against two, and thus the judgment of the trial judge in his favour was sustained. The other party appealed to the Supreme Court of Canada where he won by three judges to two, and the costs of all the courts were awarded against him. These costs would not be for services rendered to him because the solicitors for the other party rendered him no services, but as a penalty for his having resisted the appeals made by the other party after he had got judgment once in his favour, and as a penalty for having resisted an action which he won before the first judge.

. . . It ought to be enacted that where on a trial there is in the opinion of the judge an honest conflict in the evidence, or where he has found that judicial opinion has wavered from side to side of a finely-drawn line of distinction, he must exercise a judicial discretion to decide that each party shall pay for the legal services rendered to him, that is, shall refuse to impose a penalty for the litigation on the losing party, and that in every case where a party has obtained a reasoned judgment in favour he shall in case of a reversal of that judgment not be obliged to pay the penalty of the other party's costs because he endeavoured to sustain the judgment first given in his favour, but that it be sufficient that he get no costs of the trial or of the appeal and that he shall pay a penalty if he fails on a further appeal from the last judgment against him.

If an enactment of that kind were made it would establish the principle that penalties are imposed only where there is moral wrong or manifest perversity. It would remove the odium which in the minds of many people attaches to the administration of the law, and would save to many honest men and women serious heartaches.

ALEX. STUART.

Edmonton, Feb. 3rd, 1917.

OUR LONDON LETTER.

44 BEDFORD ROW, LONDON, W.C. 1.
JANUARY 31ST, 1919.

To the Editor,
"Canadian Law Times,"
Toronto, Canada.

SIR,—The visit of the President of the United States to these shores is, of course, the outstanding event of the month. Dr. Wilson's arrival on Boxing Day offered London an occasion unprecedented in all the long story of its historic ceremonials, and it greeted the President with a spontaneous warmth and enthusiasm worthy of so memorable an opportunity. In any circumstances the visit of the President of the United States to the capital of the British Empire would be an event as moving as it is unexampled. It would indeed be an insensible mind which could witness without emotion the spectacle of the President of the Great Republic riding through our streets side by side with our own beloved sovereign. It was well that such an occasion should be celebrated as a popular festival. The welcome to President Wilson was a people's welcome. It expressed not only the gratitude of the British people for the personal part that the President has played in the momentous events of the past four years, but it was the greeting of the free people of this land to the free people of America on the morrow of the victory they have jointly won for the ideas of freedom which are their common inheritance.

During his visit, President Wilson was entertained to dinner by the Prime Minister to meet the members of the Imperial War Cabinet. That function was one of the most interesting gatherings in the history of the English-speaking race. Besides the Prime Minister of Great Britain, and the President of the United States, representatives of Canada, Australia, South

Africa, Newfoundland, and India were present. The New Zealand representative was not able to reach this country in time.

The visit of President Wilson to Europe has broken the record as being the first occasion on which a President of the United States has left the American Continent during his term of office. In two instances, however, Presidents have left the United States during their terms of office, i.e., both Mr. Roosevelt and Mr. Taft visited Panama on national business as Presidents of the United States. In acknowledging the address presented to him by the corporation of the City of London, President Wilson referred to the fact that it has hitherto not been deemed excusable for a President of the United States to leave the territory of the United States, and said: "I know that I have the support of the judgment of my colleagues in the Government of the United States in saying that it was my paramount duty to turn away even from the imperative tasks at home to lend such counsel and aid as I could to this great, may I not say final, enterprise of humanity"—the attainment of peace, not merely by conquest of arms, but by agreement of mind.

The polls for the General Election were taken on the 14th inst. throughout the United Kingdom. The votes were counted and the results declared on the 28th inst. The figures show a majority for the Coalition of 262.

The Coalition majority is preponderatingly Unionist, and we shall thus have the curious spectacle of a Liberal Prime Minister being the head of a Government in which the bulk of the offices are necessarily held by Unionists, and which is supported by a Unionist majority in the House of Commons.

The late General Election was perhaps the most memorable election in the annals of Parliamentary history. The election was memorable not only because

of the historic period in the midst of which it was held, but also because of the great changes in election law which came into operation with it. For the first time the women of the United Kingdom were qualified to vote at a Parliamentary election, and according to official figures just issued there are 7,000,000 women voters in England and Wales—roughly one woman voter for every two men. Right up to the eve of the poll it was the general impression that the great majority of women were showing little interest in the election and that their vote would be a small one. To the general surprise, however, women polled very heavily. Indeed, there are indications that in some constituencies more women than men voted. Again, for the first time personal attendance at the polling station was not essential to the exercise of the franchise, the new Reform Act having enabled men and women on military or naval service to record their vote by post or by proxy. There is, however, little evidence of the exercise of the right of voting by proxy on a large scale. Another noteworthy change, which is bound to have far-reaching effects on future elections, is that all the polls have now to be held on the same day. In practice, however, at this election all the votes were not cast on the same day. Many of the soldiers and sailors on the absent voters' list received their ballot papers before the election, and on the other hand a large number of soldiers did not vote until afterwards, and their votes were good provided that they reached the returning officer in time for the opening of the count on the 28th inst.

Viscount Cave, although appointed a Lord of Appeal in Ordinary some weeks ago, continued to act as Home Secretary, and the anomaly of an occupant of the Bench serving as a Secretary of State, remained until the new Government was formed. This union of judicial and executive functions is particularly curious in the case of the Home Secretary, because he has a large amount of legal patronage at his disposal and

because he advises the King in the exercise of the prerogative of mercy. Lord Cave might, of course, be relied upon to fill his dual position with the utmost discretion, and to refrain from performing his judicial duties until he ceased to be a Secretary of State. Nevertheless Lord Cave's continued occupation of one of the chief offices of the Cabinet after he had been appointed to one of the highest positions on the Bench was subject to criticism, because it violated the principle that the judicial and the executive functions of government should be kept strictly apart.

Students of Constitutional Law may be interested to observe that both Mr. Lloyd George and Mr. Bonar Law in recent speeches, like the Coalition manifesto issued jointly by these statesmen, emphasize the fact that the choice once possessed by the House of Commons itself of the executive government has passed from that House to the electorate. Writing in 1865 Bagehot insisted upon the power of the House of Commons to choose and control the ministers of the Crown. "Our House of Commons," said he, "is a real choosing body; it elects the people it likes. And it dismisses when it likes, too." The choice of ministers—the choice of the executive government—which Mr. Bagehot assigns to the House of Commons may be said to have passed to the constituencies. This position is clearly recognized by the Prime Minister, who in a recent speech said:

"At this election, as at every election, the country will be choosing a Parliament and choosing a Government. They will be choosing a policy and an executive which is to carry out that policy. That is an idea which has not got into some people's minds. The electorate are entitled to ask two questions of every candidate: First, if he is returned, what is he going to vote for; and, in the second place, what Government he is to support. A general election in this country chooses both your legislature and your executive, so that you must put both questions to the candidate. May I point out how vastly important it is that the country should be satisfied about both, not merely about the policy, but about the persons or group of persons who are to carry the policy out? You know the working of our Constitution. You may have the most perfect programme; you may have the most excellent or beneficent

policy, but the plans are invariably initiated by the Government. It is therefore of the most vital importance that the country should in the coming election be satisfied on two given questions—First of all, the policy which each candidate is prepared to support; and, secondly, the executive or government the candidate will support once he becomes a member of the Legislature. . . . In America one election chooses an executive and another election chooses a Legislature. In this country you choose both at one election."

In January, 1917, shortly after the formation of his Government, Mr. Lloyd George declared that the Colonies and Dominions of the Crown would have a voice in the Peace Settlement, and thus the inference was irresistible that the people of this country would also have a voice in determining the final settlement of Peace. In this event the development of the Constitution will create yet another divergence between the strict letter of the law and the practice of parliamentary government. By the Constitution the right to declare war and to make peace is vested exclusively in the Crown. This prerogative is, however, exercised by the advice of ministers who are responsible to Parliament. But the previous consent of Parliament either to the commencement of war or the conclusion of peace is not formally required. "The House of Commons," says Sir William Anson, "may refuse supplies for a war, or either House may express its disapproval by resolution condemnatory of the ministerial policy, or by address to the Crown, or by making the position of the ministry in other ways untenable: but Parliament has no direct means either of bringing about a war or of bringing a war to an end." Sir W. Anson, however, perceives the tendency towards the admission of Parliament to a voice in the making of treaties. "No one but the King," he says, "can bind the community by treaty, but can he always do so without the co-operation of Parliament? It would seem to follow from the general principles of our Constitution that a treaty which lays a pecuniary burden on the people or which alters the law of the land needs Parliamentary sanction. If it were not so,

the King, in virtue of this prerogative, might indirectly tax or legislate without consent of Parliament." Dealing with the question whether the King can cede territory by treaty without consent of Parliament, Sir William Anson says that the tendency has been undoubtedly in the direction of obtaining the sanction of Parliament not merely by an address to the Crown on a vote signifying approval, but by making the treaty or convention conditional on the approval of Parliament and by the embodiment of the provisions relating to the cession in the schedule of a statute. This was done in the case of Heligoland in 1890.

It may be interesting to note that Mr. Lloyd George in a recent speech declared that he was strongly in favour of women being allowed to qualify as barristers and solicitors.

An interesting volume has recently been published dealing with Sir Walter Scott as a Judge. Lawyers generally regard Scott's connection with the law as little more than nominal, and are surprised to learn that the famous novelist sat on the Bench for some 33 years. During the whole of his career from 1792, when he was admitted to the Faculty of Advocates, until 1832, when he passed away, he was actively engaged in legal work, first, as a practising member of the Scots Bar, and then as Sheriff of Selkirk and as a Principal Clerk of Session. His practice at the Bar was never extensive, but he had a fair number of briefs. His appointment as sheriff at a salary of £300 per annum, seven years after he was called, furnished him with a welcome additional source of income. The post was the more attractive to him as its duties took him periodically to the Yarrow countryside, whose "pastoral melancholy" has been sung by Wordsworth, and over which Scott was himself to throw additional glamour. As the author explains, the office of sheriff in Scotland is a composite one,

corresponding to those of a county court judge, recorder and police magistrate. We find that Sir Walter Scott's judgments often dealt with the more quaint and picturesque side of a by-gone age—an age of toll-bars and post-horses, of French wars and French prisoners, of an austere keeping of the Sabbath, of obsolete land tenures, and of persistent poaching. One of the peculiarities of the office of sheriff in Scott's day was the right of disappointed litigants to ask the sheriff to re-consider his decision, and it seems that they exercised this right a good deal while Sir Walter sat on the Bench.

W. E. WILKINSON.

TORONTO AND YORK LAW ASSOCIATION.

The Thirty-third Annual Meeting of the County of York Law Association was held on Monday afternoon in the Library of the Association at the City Hall, with a large number of the members being present. The retiring President, Mr. D. Urquhart, presented a report of the Board of Trustees from which it appeared the membership now stood at 405, and that during the year three members had died, namely: George H. Watson, K.C., Allan H. Royce and W. C. Hall, and that 48 of the members are on active service. The treasurer's report, presented by George C. Campbell, shows a balance in the bank of $1,357.53, $200 having been paid to the Patriotic Fund. Ninety-two volumes were added to the Library during the year. The trustees had also revised the Solicitors' Tariff during the year, and it was resolved that the attention of the Finance Minister of Canada should be drawn to "the present inadequate allowance for notarial fees." After a great deal of discussion regarding the Act passed at the last meeting of the Legislature, permitting certain municipalities to place a tax on mortgages to aid the upkeep of registry offices, the meeting went on record in view of securing a disallowance of this enactment and referred it to the new trustees with that end in view. The formation of a Lawyers' Club was also approved of as was also a change in the name of the Association to the Toronto and York Law Association. The trustees were also authorized to provide a memorial to the members of the profession taking part in the war. It was unanimously resolved that Crown Attorneys for the City of Toronto and the County of York should be paid a sufficient salary to enable them to dispense with private practice and that steps be taken by the trustees to secure legislation with that object in view.

Mr. D. T. Symons, K.C., was elected President, and Mr. H. W. Nickle, Vice-President.

LEGAL EDUCATION: A SYMPOSIUM.

The Editor, Canadian Law Times,
Toronto, Ont.

DEAR SIR.—You have invited me to contribute to a discussion on the subject of legal education. I have much pleasure in doing so. To my mind the thing can be summed up in a few simple propositions.

Legal education is an ambiguous term comprising two distinct processes: (a) learning law; (b) learning to be a lawyer. (See C. L. T. Vol. XXXVIII., p. 110, where I divided the first process into two, making three altogether.) The second process consists in intimate association with practising lawyers; following the office; frequenting the Courts; practice of the profession; experience of life; it begins before admission, and continues during the whole of a man's professional career; essentially it is a process of self-education. Success or failure depends upon the reaction of the individual to his environment. Teaching has very little to do with it. On the other hand the first process, to which the term legal education might not improperly be restricted, is a different thing altogether. It is academic in its methods. It calls into play not the qualities which make for success in the rough and tumble of forensic practice, but the "still and mental parts" the cultivation of which makes an educated man, no less than an educated lawyer. It demands on the part of the teacher the same qualities as are called for in any other branch of scholastic work; concentration of purpose, sympathetic handling of the individual case, delight in the work for its own sake as one of the noblest in which the human faculties can engage. This is not a task for amateurs, who give to it two or three hours a week spared from the engrossing pre-occupations of professional life. It demands a man's whole time and attention. So much

of the teacher. What of the student? He must not be distracted from his studies. He must not suppose that legal education consists in hearing two or three lectures a day, committing them more or less accurately to writing, getting them off by heart, reproducing them more or less inaccurately in examination, and so being crowned with a diploma or degree. This is not education at all. It is an abuse of the powers of the human mind. May I repeat what I have said before in your columns? "Every hour in the class-room ought to imply several hours of private study; how many depends upon the nature of the subject and the individuality of the teacher. A lecture is like an ice-berg; the part that shows above the water is only a small part of the whole. So in the matter of lecture attendance. The student who runs away to the office as soon as the lecture is over gets little good from the lecture, and, I should suppose, the student who runs away from the office to attend lectures does not get the full advantage from the office either."[1] Briefly: Do one thing at a time, and do it in the best possible way. The conclusion follows inevitably. Law school study and office attendance should be consecutive, not concurrent; and further, as I have indicated above, the work of the law school should, when possible, be principally entrusted to men who are adapted to this kind of work. In saying this I must not be understood to rule out the valuable assistance which can be rendered by judges and practising lawyers; all I mean is that we cannot expect them to be specialists in education.

I am prepared to hear an objection, which is listened to with respect when it comes, as sometimes happens, from men of high standing at the Bar. It amounts to this: "What is the good of a law school training? I have got on well enough without it." The answer is obvious. "You, my dear sir," one might reply, "have succeeded not because of the sys-

[1] C. L. T. vol. XXXVIII., p. 262.

tem, but in spite of it. Your powers of brain, your force of character, would have brought you to the front under any system. It does not follow that what has done well enough for you, is the best possible system for the average man. And further, what was good for you twenty or thirty years ago is not necessarily good for everybody, or for anybody, under the altered conditions of the present day."

Not to claim too much weight for my own opinion (though I may say that I have been teaching law for many years and write with some experience), I would urge any of your readers who doubt the truth of what I say to procure the recently published "Centennial History of the Harvard Law School." Why has that institution risen to its present commanding position, why is it famous the world over, why has it shown the way to many other law schools in the United States of America, which by following its lead, are able to compete on equal terms for pride of place? Simply because, some fifty years ago, a man of genius called Langdell advised, and a man of vision called Eliot approved, what was then a new departure in legal education. I attach less importance to the method than to the spirit which animated it; which was essentially nothing but this—concentrated and continuous effort on the part of teacher and student directed towards the desired end.

The system inaugurated by Langdell and Eliot has fully justified itself. But there is one weakness in the law school training of the United States. As a preparation for practice it is incomplete. It should be followed by one or two years in the office. This is the recommendation of the Report on Legal Education presented to the Canadian Bar Association last year and reprinted in your September number[2] — *three years in the Law School, followed by one or two years*

[2] C. L. T. vol. XXXVIII., p. 561.

in the office. If this is adopted, we shall have in Canada the best system of legal education in the world.

I should like to say something about methods of study; the value of the comparative method, which is calculated to "quicken and invigorate the understanding," and no less, to "open and liberalize it";[3] the importance of instilling into the student a sense of professional honour and of civic duty; but I must not encroach further upon your space. May I add merely that legal education should be directed to producing not only competent practitioners, but men who by their wise and sympathetic handling of the problems of our national life, will add to the dignity and influence of the great profession of the Law?

R. W. LEE.

McGill University, Faculty of Law.

[3] C. L. T. vol. XXXVI., p. 114, quoting Burke.

LEGAL EDUCATION.

By G. F. Henderson, K.C., Ottawa.

The discussion of the report on Legal Education at the last annual meeting of the Canadian Bar Association showed plainly that there is a very wide divergence of opinion on this very important and very practical subject. On the one hand there are those who feel that for a considerable part of his time at least the student should be free from any office duties so that he may devote his time to the study of the science of law; on the other, those who believe that the student can best understand his reading if he can see the practical application of it from day to day in an office or at the Courts. There is much to be said for each side, and I must confess to great sympathy for those sincere men and sound lawyers whose lot it is to have to teach the average students in Canada, and who realize how difficult it is, under any existing system, to turn them out as lawyers in the proper sense of the term. They are chiefly men to whose great credit it is that they esteem learning as beyond price, but the difficulty of their position is that in this country the young man must be equipped to earn a living, and to earn a living from the beginning of his professional career. A fair knowledge of law is of course essential, but to the great majority the main practical essential is to gather clients and build up a practice. If the young man who starts in this way is wise and has natural ability, he will of course see to it that he improves his acquaintance with the science of law as time goes by. In his student days, however, he knows that the experience of the office and the practical application there of his limited knowledge of the law is much more likely to teach him how to build up a practice than attendance at lectures.

Quite obviously, the ideal would be a thorough grounding in principles, followed by practical appli-

cation of these principles, but it is equally obvious, to those who have been in active practice for any length of time, that the usual term of study will not suffice for both, and many of us are forced to the conclusion, perhaps with regret for the sacrifice of an ideal, that the system of combining lectures with office work is the best.

After all, I doubt if our regret should be real. We can all look back and recall many a brilliant student who has not continued his academic success into active practice, and many an ordinary student who has developed in after life skill and ability quite unexpected during his student days. Some of the very best of the younger men with whom I have had to do in our profession were strangely innocent of knowledge of the law when they began to practice, but you will generally find that the successful lawyer was trained in a good office and took advantage of its opportunities. Law is essentially practical, and it is better to have a limited store of knowledge with the ability to use it to practical advantage, then a greater knowledge without that ability. Experience teaches in everything, and the lawyer should be learning law every day of his life. That commercial motto, "the great thing is not to know the law, but where to find it," is of course a heresy, but there is a lot of sense in it. The great thing is to be so favoured by nature as to have an instinct for legal principles, to appreciate one's own lack of knowledge, to know where to supply that lack, and to apply the knowledge when attained in a practical way to the practical benefit of one's client. All this is a never ending process, and legal education is never complete. Canada has produced many lawyers who can be called really great, but whose training has been of this character, and we need not despair if it should be found necessary to continue our methods of legal education as in the past.

Note that this expression of opinion is based upon the assumption, also matter of opinion, that the stu-

dent's term is too short to permit of his acquiring office experience separately from his time of attendance at lectures. To the five-year student this difficulty is not so pronounced as with the graduate, but we must surely be careful not to discourage university training. Space would not permit of discussion of this subject, but I assume that the advocates of untrammelled attendance at lectures will logically view the matter from the point of the graduate. It takes time to obtain practical experience, even in the best regulated office, and my feeling is that even the most diligent student with the most favourable office facilities needs all the time he can spare to office work during the whole of his term.

DOES FORECLOSURE UNDER LAND TITLES ACTS EXTINGUISH THE MORTGAGE DEBT?

The case of *Douglas* v. *Mutual Life Ass. Co.*,[1] in which the appellate division of the Supreme Court of Alberta reversed the decision of Mr. Justice Simmons (p. 239) and held that foreclosure under the *Land Titles Act* did extinguish the mortgage debt, is cited and relied on as an authority in a previous article: see vol. 38, p. 748 (December, 1918)—"*Foreclosure of Registered Land under Land Titles Acts.*" At p. 751 of the former article it is pointed out that the Alberta Court "expressly approved of and followed" the Australian case of *Fink* v. *Robertson*.[2] The Supreme Court of Canada, however, has now reversed the decision of the Alberta Appeal Court and restored that of Mr. Justice Simmons.[3] The Supreme Court of Canada definitely declined to follow *Fink* v. *Robertson*. The result is that the High Court of Australia and the Supreme Court of Canada are at variance upon the question whether a mortgage debt is extinguished by foreclosure under systems of registration of title such are contained in *Land Titles* or *Land Transfer Acts* and commonly known as "Torrens Systems." In the event of the question being taken on appeal to the Privy Council, which of the two conflicting views is likely to prevail?

Both in the Canadian and the Australian case there was a difference of judicial opinion, the degree of difference as regards judicial units being precisely the same. In the three Courts through which *Douglas* v. *Mutual Life Ass. Co.* passed, out of ten judges the majority in favour of the view that ultimately prevailed was six to four. In the two Courts through which *Fink* v. *Robertson* passed, out of five judges the majority was three to two. But there are other considerations which tend towards putting a greater

[1] [1918] 1 W. W. R. 690.
[2] (1907) 4 C. L. R. 864.
[3] [1918] 3 W. W. R. 529.

weight of judicial authority on the side of the Canadian view. The highest Court in Canada was unanimous, and the highest Court in Australia was not unanimous. Again, the four Canadian judges who agreed with the Australian decision were somewhat influenced by the circumstance that it came "from the highest Court of the country where the Torrens system originated and has had its most general application:" p. 693 of the judgment delivered in the appellate division of the Alberta Court.[4] On the other hand, the opinion expressed by the judge of first instance in Alberta and by the judges of the Supreme Court of Canada were based altogether on the same independent reasoning as that adopted by the dissenting Australian judge.

The facts of the Canadian case undoubtedly made it much easier for a judicial decision to be given in favour of the non-extinguishment of the debt, since the mortgagor had given a collateral security in addition to the security over the land and the personal covenant. In the Australian case the question to be decided arose more nearly *in vacuo,* and there was nothing but the plain issue—was the personal covenant contained in the mortgage instrument extinguished by the foreclosure so as to extinguish the whole debt? On these grounds it might be urged that the two cases are sufficiently distinguishable to prevent their being regarded as inconsistent. But such an explanation would not have a proper regard to the *ratio decidendi* of the Canadian case. This *ratio* was distinctly the general principle embodied in the proposition that foreclosure does not extinguish the debt. The principle relied on by the Australian Court was that foreclosure does extinguish the debt. There seems, therefore, to be no escape from the position that the decisions are inconsistent by relying on any difference in the facts.

It might also be urged with some plausibility that the Alberta Registration Statutes differ from those of Victoria sufficiently to make the cases distinguishable

[4] [1918] 1 W. W. R. 690.

The only difference that could thus be relied on is the existence in the Alberta statute of an enactment permitting foreclosure to be obtained by proceedings in Court as well as by the statutory method (which only can be adopted under the Victorian statute), with a proviso that if the new statutory method were adopted the other proceedings permitted should not be taken: see ss. 62, 62A of the *Land Titles Act*. This proviso was said to imply that the debt was not released and extinguished. But here again the whole *ratio decidendi* must be taken into account. The decision of the Supreme Court of Canada does not rest on any narrow distinction between the Alberta and the Victorian statutes. Mr. Justice Simmons in the Alberta Court, and the Chief Justice of Canada, Mr. Justice Idington and Mr. Justice Anglin in the Supreme Court of Canada, all expressed their preference for the dissenting judgment of Mr. Justice Higgins in the High Court of Australia as against the judgment of the majority delivered by the Chief Justice of Australia.

What the Supreme Court of Canada in *Douglas* v. *Mutual Life Ass. Co.* has done in effect is to adopt the principle underlying the dissenting judgment in *Fink* v. *Robertson*, and add some further reasons for coming to the same conclusion with respect to the Alberta statute, but in such a way as to make it clear that the decision is based on the broad principle and not on a narrow construction of statutes. The decision of the High Court of Australia is equally based on a broad principle, and the point of interest is, which of these two principles should prevail, having regard to the proper elucidation of the scheme of registration of title set up by such statutes as those of Victoria and Alberta? The difference between the two principles can indeed be reduced to one of degree, and it amounts to this: Has the law of mortgage and foreclosure been changed by registration of title to the extent of making foreclosure operate as an extinguishment of the debt (as held in Australia), or has the change only been one of procedure, leaving the mortgagee with sub-

stantially the same rights as before (as held in Canada)?

The keynote of the Australian decision is that the registration statutes established "a new mode of conveyancing the fundamental principle of which was that title to land should depend upon registration and not upon instruments *inter partes*" (*Fink* v. *Robertson*, at p. 871). Part of the new mode of conveyancing is the system of mortgage, by which a charge is created instead of a conveyance of the land being made to the mortgagee. The mortgagee upon registering an order of foreclosure is held by the High Court of Australia to become the transferee of the land in such a way that the mortgage previously existing is completely merged and extinguished. Mr. Justice Higgins holds that the change in the law made by the new method of mortgaging is not so revolutionary, and that even after foreclosure "the mortgagee holds an unsatisfied covenant for payment, and there is nothing to be found in the *Transfer of Land Act* enacting that the covenant is to be deemed satisfied." Foreclosure and redemption are considered to have much the same meaning and to confer much the same rights as under the old law of mortgage. This is the reasoning approved and substantially adopted by the Supreme Court of Canada.

In adopting the reasoning of Mr. Justice Higgins and the view taken in his dissenting judgment rather than the view of the majority of the Australian Court, the judges of the Supreme Court of Canada have added observations of great value with reference to the statutory system of mortgaging by means of a charge in lieu of a conveyance. In particular the Chief Justice draws attention to the fact that the Torrens system has really adopted the method of mortgaging as carried out in the civil law, and points out the likenesses and differences that exist between the civil law of mortgages and English law. He also points out that it is now generally recognized that under the English system of mortgage by conveyance, "although old

forms are still used," the mortgagor is the real owner of the land and the mortgage is a mere security for the debt. This of course was laid down some years ago in *Heath* v. *Pugh*.[5] The Chief Justice said, with reference to this: "I cannot see why, if the mortgage is a mere security for the debt, the right *in personam* should not continue to exist after the debtor by foreclosure has lost his right of redemption for ever . . . there is no evidence here of any intention on the part of the mortgagee to take the property in satisfaction of his debt."

Perhaps the strongest argument, apart from any critical examination of a particular statute, in favour of a conservative view being taken of the effect of registration of title on the law of mortgage and foreclosure, is the continued use of the terms "foreclosure" and "redemption." This might, to many judicial minds, just turn the scale against the more revolutionary view adopted by the High Court of Australia.

With regard to the relative weight of authority to be given to the two opposing decisions in Canada and Australia, it ought to be mentioned that special leave to appeal from the decision of the High Court of Australia in *Fink* v. *Robertson* was refused by the Privy Council.[6]

This circumstance does not appear to have been brought under the notice of the Supreme Court of Canada. It is certainly entitled to some weight, even though not officially reported.

However regrettable it may be, in the interests of uniformity of case law throughout the Empire, the Courts in Canada must, in the absence of legislation (such as has been passed in British Columbia), and pending an authoritative pronouncement by the Privy Council, now take the view that foreclosure under *Land Titles Acts* does not extinguish the mortgage debt, whilst the Courts in Australia must take the opposite view—that foreclosure does extinguish the debt.

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[5] (1881) 6 Q. B. D. 345, 360.
[6] Times, July 20th, 1907.

TWO EXPERIMENTS WITH A SINGLE CHAMBER LEGISLATURE.

England and France each tried the experiment of a single chamber legislature, and it is worth seeing with what result. We have several single chamber provincial legislatures, and it will be interesting to those who watch their working to see if there is any similarity between their working and that of the single chambers first mentioned.

In 1642 England had King, Lords and Commons. King and Lords were swept away by the revolution that commenced in that year. Cromwell tried to rule with one chamber, and in a very few years refused to remain Proctector unless given a second House.

The French Constitution of 1791 ignored the First and Second Estates and provided for a King with a suspensive veto and one chamber.

By 1795 it had a new constitution with two chambers and a directory of five for an executive.

The Long Parliament met in 1640 and by 1642 was at war with the King. By 1648 the army of the Parliament took control of the country and had Charles I. and Parliament in its grip. On December 6th and 7th of that year 47 members of the Commons were arrested and 96 "excludit the House by the blasphemous Army," as the Scottish Commissioner wrote home. This was "Pride's Purge." The Purged Commons is known as the "Rump." On January 1st, 1649, the Commons passed a resolution and ordinance for the trial of the King. On January 2nd the Lords (12 in number) rejected the resolution and ordinance. The Commons were not at the end of their resources. On January 4th they passed this resolution:—"That the Commons of England in Parliament Assembled do declare that the people are under God, the original of all just power; and do also declare that whatsoever is enacted or declared for law by the Commons in Parliament Assembled hath the force of a law and all the

people of this nation are concluded thereby, although the consent and concurrence of the King or House of Peers be not had thereunto."

On January 9th they ordered a new Great Seal to be engraved.

They then proceeded to try the King. He was beheaded on January 30th, asserting almost with his last breath that the people had nothing to do with Government.

On the afternoon of that day the Commons passed an Act prohibiting the proclaiming of any one King.

On February 6th it was resolved: "That the House of Peers in Parliament is useless and dangerous and ought to be abolished." On February 7th it was resolved that the office of a King was unnecessary, burdensome and dangerous.

Acts were subsequently passed giving effect to these resolutions.

England was a Republic and in search of a Constitution. A draft of one from the army was already before the House.

On this same 7th of February the Purged House of Commons "ordered that there be a Council of State erected to act and proceed according to such instructions as shall be given to them by this House."

On February 17th this Council held its first meeting, having received almost plenary powers. This Council lasted until 1659 or until the last Cromwellian Constitution was adopted in which a House of Peers or Second or Other House was provided for.

In the meantime it seemed impracticable to proceed to deal with the new Constitution. The Rump House of Commons and this Council of State had to govern for some further time.

Scotland and Ireland were more pressing subjects of anxiety to the new Republic than its Constitution.

On September 16th, 1651, Cromwell returned to the House.

Ireland had been conquered and Scotland annexed. England had meantime been governed by the Council of State and the House and without a Constitution. Attendance at the Council, which consisted of 41, ranged from 10 to 20 at a sitting, and in the House probably averaged 50, falling as low as 36. The attendance varied with the fortunes of the new Republic. After Worcester the attendance in the House ran up to 120. This was but a small part of the original 500 members elected in 1640.

The question of the termination of this House and the election of a more representative one at once came up in earnest. The motion to bring in a bill for setting a time certain for the sitting of the then House and the calling of a new Parliament was carried in a House of 59 by a majority of 7. The motion was Cromwell's. The subject had been before the House for three years, but nothing was done. On November 18th, 1651, the time was fixed for November 3rd, 1654.

What about the new House? There was much delay, but on February 23rd, 1652-53, a bill was reported to the House. This bill was subsequently taken away (before being passed) by Cromwell and no copy is known to exist, but it is alleged that it contained two provisions, (a) continuing the Rump members without re-election, and (b) reserving to a committee of themselves the right to superintend the election of the new members and try their validity and the fitness of the new men.

Cromwell alleged this in substance and no serious contradiction was made when in his lifetime he could produce the bill. Historians like Carlyle, Godwin, Guizot and others agree that the bill contained these provisions.

On April 20th Cromwell was informed at his lodgings that the bill was in the House and was being rushed through. He went to the House, listened to the debate and when the question came to be put he got up and among other things told the members

"that the Lord had done with them." He proved this by calling in his soldiers who ejected the members.

From April 20th to July 4th, England was governed by the Council of Thirteen—Cromwell and eight officers and four civilians. Cromwell was a Dictator. On July 4th Cromwell, having already chosen an Assembly of 139 to represent England, Scotland and Ireland, constituted it the Supreme Authority till November 3rd, 1654, with power to choose their successors in another Assembly three months before that date. This Assembly adopted the name "Parliament of the Commonwealth of England," and is known in history as the Little Parliament or the Barebones Parliament. The Council was increased from 13 to 31 and was to be the Executive of Parliament till November 3rd next. It was continued without change for six months longer on the 1st and 2nd of November, but both it and Parliament collapsed in a little more than a month though much good work had been done or commenced. The Parliament was by this time pretty fairly divided into a Radical and a Conservative party, which will not surprise any one with a moderate knowledge of human nature. It worked along, however, till it came to ecclesiastical questions. On November 17th a resolution to abolish patronage was carried by 58 to 43. On December 2nd a report was brought in virtually arranging for a State Church supported by tithes. A motion to adopt the first clause was lost 54 for 56 against. The subject was an important one and could not be shelved if there was to be peace in the country. Cromwell had abjured the right to dissolve the House or its successor. What was to be done? Parliament itself settled the matter. On December 12th Speaker Rous and a body of the members, whose numbers are controverted, left the House, went to Cromwell and presented him with a paper resigning their trust. The Little Parliament was at an end. There were then meetings of the Council of Officers called by Cromwell and the con-

clusion reached that the Government must be tried through the medium of a "Single Person." Cromwell was sworn in as Lord Protector on December 16th. On September 3rd, 1654, the first Parliament of the Protectorate opened. The instrument of Government to which Cromwell swore fidelity before he assumed office of Protector on December 16th, 1653, provided for, (1) The Lord Protector, (2) The Council, (3) Parliaments. Bills passed by Parliament were to be submitted to the Protector for his assent, but if not contrary to the Constitution became law in 20 days if adhered to by Parliament without his consent. This Parliament spent its time chiefly in discussing and formulating a new Constitution and defining the limits of toleration. On January 22nd, 1655, they were dissolved without having sent up a single bill for the Protector's assent. Their new Constitution was ready and was being engrossed when dissolution came. The junction of the extreme Republicans and the Presbyterians made this Parliament anti-Oliverian.

Then came a period of rule by the Protector and his Council of 20 months (till September 17th, 1656). The three Kingdoms were divided into 10 districts and each was in charge of a Major-General and a military force. Government was by Court Martial, but ostensibly under the original instrument of the Protectorate.

On September 17th, 1656, Cromwell's Second Parliament met. Four hundred were elected, but 93 were excluded. The House thus constituted was Oliverian.

On February 27th, 1657, a deputation of 100 officers waited on Cromwell, there being rumours of his being made King. He, among other things, said to them:— "A House of Lords or other check upon the arbitrary tendencies of a single House of Parliament may be of real use." He instances Naylor's case and points out that this may be any one's fate another day. Naylor was a crazy Quaker, tried illegally for blasphemy by the Commons and brutally punished. Then came the

question of a new Constitution. Article I. of an address proposed that the Protector should assume the name of King. Article II. proposed a Parliament of two Houses.

On March 5th, 1657, the second Article was discussed and passed without a division. Cromwell was in hearty accord with this change. He only lived for nine months after the new Constitution was passed and dissolved his first and last parliament held under this Constitution. How it would have worked if he had lived it is now useless to enquire.

Cromwell had unique experience in the making and working of constitutions and his reasons for two Houses should be interesting and instructive.

In his first speech (Carlyle's *Cromwell*) to his first Parliament he speaks of "The House of Peers laid aside" as one of the great things brought about by the successes of the army and its having the print of Providence on it. He charges the Commons (the Rump) with insincerity and with endeavouring to recruit the House with a view of perpetuating themselves instead of providing for a new House by choice of the people.

In speech three Cromwell goes into the question of the Rump endeavouring to perpetuate itself very fully. He is more specific even than in his first speech. He charges it also with the confiscation of goods and estates, that "poor men under this arbitrary power were driven like flocks of sheep by forty in a morning to confiscation of goods and estates, without any man being able to give a reason why two of them should forfeit a shilling."

"This was but a taste of the miscarriages that then were." Then he returns to the subject of Parliament perpetuating itself and being arbitrary calls it a running sore that must be stopped,—"Under such there is no security for goods or persons, for laws can be made after the facts committed." Par-

liament with a single person to check it he then regarded as a fundamental of Government.

In speech four, dissolving his first Parliament, Cromwell referred again to the fundamental of a single person and a Parliament, asserting that it was in accord with the general sense of the nation which had experience enough of "other conclusions"—single House without a check.

In speech thirteen, which was addressed to a committee of his Second Parliament, which had propounded the new Constitution providing for a King and two Houses, he charges the Rump Parliament again with the desire to perpetuate itself, or instead to create a continuously sitting Parliament renewed by new men as the old ones died. He brings up also another very serious charge against them, viz., a superseding of the Courts of Justice. He says, "if any man had come and said 'What rules do you judge by?' Why, we have none; we are Supreme." "We" in legislature and in judicature. He then points out the failure of the Little Parliament which ran to extremes in its desire to abolish tithes and a ministry altogether.

He refers in this speech also to the constitution of the new House. He was to name it (not more than 70 or less than 40), the Commons to approve. After it was constituted he was to appoint with the approval of the new Second House. A few days after this, June 26th, 1657, the petition and advice with amendments (chiefly in leaving out Article I. concerning the title of King) was agreed to and there was a new constitution with a Second House.

The second sitting (January 20th, 1658) of this Parliament was not a satisfactory one. The House of Commons or some members in it spent the time in discussing what they should call the new House,—Other House or House of Lords.

They are ten days at it and then, February 4th, 1658, Cromwell makes a speech to them and dissolves the House. This is speech 18.

This is what he has to say about the Second House, —the burden of governing with the old single House was too great for any one. He would sooner keep a flock of sheep than undertake it. He had therefore asked for help if he was to be Protector. He says, "I did tell you at a conference concerning it that I would not undertake it unless there might be some other persons to interpose between me and the House of Commons (who then had the power), and prevent tumultuary and popular spirits; and it was granted I should name another House."

There were men in the Commons that were not satisfied with the title of Protector or with the new House.

Cromwell had to again put down insurrection with a strong hand and did it effectually. He was looking forward to a new Parliament, but died on September 3rd, 1658.

When Louis XVI. in 1788, bending to the unmistakable wish of the people of his Kingdom, determined to convoke the States General, he found that there was no settled practice as to number to be summoned or the manner of election. Neither was there any settled practice as to how the Deputies should assemble,—whether in one House or each Estate by itself. Neither the King or his Minister had any plan or clear idea of how to proceed.

The numbers of the Third Estate were fixed by edict of December 27th, 1788, so that they would equal the number of the First and Second Estates combined. The whole number of Deputies was fixed at 1,000 at least.

The Convocation was fixed for April 27th, 1789, and the States General was presented to the King on May 2nd, 1789. In prior Assemblies the three Orders

sometimes sat together and sometimes separately. Where the Third Estate was in a minority it was its desire to sit separately or otherwise it would have little or no influence. Now, however, with its increased numbers and the votes it was sure to get from the country clergy and some members of the Second Estate, it clearly saw that it could swamp the other two Estates if it could reverse its former practice and arrange for the three Estates to meet as one House and vote by poll. By an oversight of M. Necker, the Third Eestate got possession of the Estates room and kept it, waiting for the other two Orders to come to it. A number of parish priests came in and on June 17th by a vote of 491 to 90, the Third Estate declared itself the National Assembly, annihilating at one blow the authority of the King and the other two Estates. On June 22nd, a majority of the First Estate joined the Third. On June 23rd the King addressed the Assembly and announced his intention to maintain the separate deliberations unless the three Orders should themselves ask to be united. At the same time he declared the declaration of the Third Estate null and void and ordered the Assembly to disperse. It was too late. The Third Estate remained in session after the King, the nobility, and a part of the clergy went out. It was again the victor. The next day the majority of the clergy met with them. The King then, by the advice of his Minister, M. Necker, advised the Duc de Luxembourg, President of the Chamber of Nobility, to join with the First and Third Estates. The President warned the King of the consequence. He was under no delusion. The States General united would have no master; divided the King might have some control. The King then ordered the nobility to join. They were not ignorant of the certain results. The Duc de Diancourt said in the chamber that to accede to the Royal order would be "to do that of which honour will never be able to speak even in a whisper." On June 27th the three Orders were sit-

ting united as the National Assembly. M. Morimer had published a work before the Estates assembled demanding the formation of two Chambers. The Bishop of Dangres and M. Malouet were of the same opinion. There was not yet any suggestion of anything but a monarchical form of Government and the King was not personally disliked. There were many able and conservative men in the Assembly among the Deputies of the old Third Estate. The mandates to the Deputies almost unanimously instructed them to provide a Constitution. A committee was appointed to prepare one. Meanwhile the King dismissed M. Necker, in whom the nation trusted much. The secret councillors of the King were feared and hated. Tumult broke out in Paris and the Bastille was taken on July 4th. France was at once in flame. There were riots everywhere. There were men in the national Assembly who recognized the new force now let loose without any executive strong enough to curb it. They catered to it and were ambitious to control and use it. The nobility and clergy acted well at this juncture of affairs and voluntarily agreed to what was demanded of them. On August 4th the privileges and rights of the old régime perished. The Revolution might well have halted here.

On October 5th a Parisian crowd went to Versailles and brought the King to Paris. The Assembly decided to go with him and meet there. One step after another led to chaos. Mirabeau writing on December 3rd, 1789, thought that a pilot with intelligence could easily have floated the ship. Louis XVI. was no pilot for such a ship nor was Necker, who, having been recalled, soon resigned. On September 14th, 1791, the new Constitution which had been voted in numberless decrees was, after revision, promulgated. Ninety-nine Deputies had voted for two Houses and 498 for one. It created a Legislative Assembly and gave the King a suspensive veto.

On December 30th, it declared itself defunct. On October 1st the Legislative Assembly began its career.

It went from bad to worse. The municipality of Paris became the real power in France and overawed the Assembly through its mob. In less than two years' time it was clear the Assembly was nowhere. The King's veto was destroyed and he was dethroned and imprisoned. The executive power passed to the Commune who, in turn, handed it over to professional assassins. Priests, magistrates and prisoners were massacred in Paris and other towns soon followed the bad example of the Capital. The Assembly declared that a National Convention should be held under universal suffrage. The hideous massacres of September followed, the Assembly being powerless.

On September 21st, the National Convention assumed the government of France. This convention, after executing the King and destroying the Girondins, decreed a new Constitution. This is known as the Constitution of the year III., and was sworn to by the representatives of the Primary Assemblies in Paris on August 10th, 1793. There was to be a Legislative Assembly elected for one year by the Primaries and an Executive Council of twenty-four mediately by electors chosen by the Primaries. Decrees relating to the urgent wants of the State became law when passed, but general laws and less urgent did not become law unless, being laid before the Primaries, they were not objected to. It was not put into operation, being suspended on October 10th by a resolution of the Convention declaring the Government revolutionary until peace.

Then came the law of "suspected persons," the murder of the Queen, the execution of the Girondins, —in short, the Reign of Terror. It simply made decrees daily for the political clubs or the Commune of Paris.

Robespierre was then ascendant. The Convention was committing suicide, massacring its own members as well as thousands of citizens. Robespierre's turn came next and then the Thermidorians, after a struggle, prevailed. They were in turn overpowered

by the Moderates, with the remnants of the Jacobins. In 1795 a new Constitution was enacted. It consisted of two Chambers, a Council of five hundred and a Council of Elders elected directly by the Primary Assemblies. The Elders had to be 40 years of age and married or widowers.

The executive power was placed in a Directory of five, elected by the Councils. They had no power of veto.

The Constituent Assembly in the Constitution of 1791 had provided that no one in that Assembly should be eligible for election in the new Legislative Assembly.

Under this new Constitution two-thirds of the new Assemblies were to be elected from the members of the Convention; one-third only was new. This caused great discontent. The Convention dissolved on October 26th, 1795, and the two new Councils or Houses were constituted. The Convention had met on September 21st, 1792, and dissolved on October 26th, 1795. It had reigned and governed a few days over three years. The Legislative Assembly in calling the Convention had suspended the executive powers of the King pending the action of the new Convention. Its first act was to destroy the royal authority. For three years the Convention ran its unbridled career. It was simply one Chamber without a check of any kind and probably committed more iniquity than any House that ever sat.

Mirabeau's statement in the Constituent Assembly that the King's prerogative was "the most precious possession of the people" was more than made good. He was quite right in saying that without it he would sooner live in Constantinople that in France. The Constituent Assembly in framing the Constitution of 1791 had through national pride and dislike of England, rejected both the second Chamber and the absolute veto of the King. France paid dearly for this mistake. The weak spot in the new Constitution was the executive, the five directors, all extreme revolu-

tionists, caused division where unity is imperative. Besides to remove Ministers the Councils had not power except through the Directory. France had still a long way to go before she got her present Constitution of President, Senate and Chamber of Deputies. The military power was invoked before this Constitution was voted and it in time had to have its turn. From this time till now there was always at least the form of two Houses in the new Constitutions.

There was immediate improvement in legislation under the new system of two Houses. All writers on French history agree in this.

The English and French Single Chamber Legislatures had or assumed all the powers of government. They both show that a single unchecked Legislature has the following weaknesses: (1) a desire to perpetuate itself and to change its Constitution at its own will; (2) a disregard of the rights of persons; (3) a disregard of the rights of property and contracts; (4) usurping the duties of the Judicature by special legislation and through the medium of committees; (5) injustice to minorities. The party numerically the strongest has for the time no motive to compromise. Its legislation is therefore extreme and on a change of power it will necessarily be extreme in the opposite direction. *Vae victis* is the motto; (6) over legislation. The French National Convention was the greatest sinner in this respect. It made laws by the thousand and often changed them four or five times in a day. Milton, who was a close observer of the Government, ventured advice to Cromwell cautioning him against this. With over legislation there is apt to be crude legislation; (7) it is very liable to be seriously affected by gusts of popular passion. Mobbing the Legislature became a science in Paris and there was some of it in London. There may also be excitement inside as well as outside the Legislature.

W. B. Ross.

Ottawa.

A CHAPTER FROM FROISSART.

How William de Bosco, one of the Viscounts of the County of La Chancellerie in Guienne, was forced by his men-at-arms to do penance in the Hall of his own Castle for misprision of them in saying that they could not shoot with the long bow so deftly as the Archers of Westminster.

William de Bosco (otherwise called 'Le bien aimé) was Viscount of a Viscounty of La Chancellerie, in Guienne. He was a good Knight, fearing God and loving equity, and he kept his Viscounty in peace and order with the aid of many valiant Knights and stout Squires, who had conquered and subdued the said County of Chancery unto their own use and profit from out of the fertile plain or debateable land lying between Poitou and Guienne, known as the 'Pays de Droit,' or 'Pays Légal,'' called by the English 'The Law Countries.' These had formed themselves into a gallant Fraternity called 'Les Chevaliers du Grand Sceau,' for that at their solemn jousts fought 'à l'outrance,' with sharp swords and pointed lances, they had a great seal for their guerdon of honour, and for their Grand Master, Count, and Champion, whosoever of them could achieve the same seal; to whom they gave the style and title of 'Le Seigneur du Grand Sceau;'—a badge of honour greatly esteemed and had in renown of all noble companies and valiant souls, and which whosoever won and fast held, was thereby invested and instituted into the said county, and thereupon became and was styled the 'Count of Chancery.'

One day as it chanced, whilst the companions were tilting and jousting before the Viscount after their manner, the said Viscount was heard to say, 'By the great seal (for so these Knights swore) 'yonder gentlemen, albeit good men-at-arms, can scarce use the long bow like the Archers of Westminster.' The good Viscount (albeit he spake God's truth herein)

spoke this almost under his breath, insomuch that John de Wyckins, a Squire who stood by, was wont to deny stoutly that he ever spake any such words, at least louder than a whisper, or so that any that had not very long ears could in anywise have overheard them. Natheless the said words being publicly reported and noised abroad, did not fail to breed great debate and despite among the said Knights of the Great Seal, who were well known throughout all the Law Countries no less for their prowess than for their 'outrecuidance.' They said within themselves: 'Surely all men will hold us for nought, when our own Viscount William himself thus speaks of us! Alas! for the honour of "Le Grand Sceau!" That good Knight and valiant Captain, our noble Grand Master, Frederick Count of Chancery (whom God preserve) who did battle against the pagans at Copenhagen, and who by the side of these very Archers of Westminster fought his way into the Court of their palace of yore, hath ever still a kind word for a comrade, is himself a right good Archer, and to this day he loveth a Westminster man;—had he said these words we would have borne them; but as for Viscount William, we will deal roundly with him, and will soon see of what stuff he is made.'

They then communed amongst themselves, and resolved and determined, by the voice and consent of all, that three comrades of the Grand Sceau should be deputed to deal with Viscount William therein, on behalf of all, and to compel him to repent and to do penance in the Hall in respect of the aforesaid words, or otherwise to put him to fine and ransom at their pleasure, and to handle him so that the honour of the Fraternity should be not only preserved and augmented, but that they should thereafter acquire great spoil and profit out of all the Law Countries.

These Knights were, Sir Hugh (surnamed 'L'Irlandais'), Sir Richard de Aylesbury (called 'Sans Peur'), and John Rolt (otherwise de Gloster). These three

companions were the three best lances of the brotherhood, and it was often made a question amongst the Knights which of them should carry off 'Le Grand Sceau,'' and would reign over the rich County of Chancery, when the tenure of the good Count Frederick (whom God keep!) should finally cease and determine.

These three Knights, then, having been solemnly sworn upon the Great Seal to do their 'devoir,' made repair to the good Viscount, and opened the matter to him, as had been theretofore determined. They found the good Viscount in a very pious and discreet temper of mind, willing devoutly to make his peace with God and the good Knights, and protesting in all sincerity 'that the honour of the Great Seal was as dear to him as his own; that his words (so complained of) escaped him without reflection, or intention of staining the renown of the Confraternity; that, as for the men of Westminster, he did not doubt but that if they were ill-advised enough at any time to enter into the County of Chancery with intent to win spoil or honour therein, his own companions the good Knights of the Great Seal would shoot both faster and further, with bolt or shaft, at butts or rovers, and would soon have the upperhand of them all—aye, even if it were Sir Fitzroy de Kelly, or Sir Edwin James themselves, in their proper persons.' Whereupon the said three Knights, finding the said Viscount so piously minded, did say unto him: 'Sir William, it behoves you, who know so well how to do Equity, to repeat this in proper form and style, to wit, in guise of a penitent, in the Hall of the Great Seal, and before all the Knights thereof in Chapter assembled, and clad in the robes of the Order; for so it hath been concluded and decreed by all the Knights for their further relief in the premises.'

'By the help of the Great Seal' (quoth Sir William), 'this will I do in all truth and humility, and they shall have such further relief herein as they pray.'

So the three Knights departed from him, right glad and merry in heart, and did repeat unto the companions what had been therein done and concluded, whereof they had great laud.

So on the morrow, the Hall was full of the Knights arrayed in their robes, and of many of their squires, pages, and followers, marvelling what would thereupon ensue. Sir Hugh d'Irlandais and Sir Richard de Aylesbury were hindered by divers weighty affairs; but John de Gloster sat in the front rank, solemnly arrayed in his silk robes—Ah, me! but it was a pity of the good Viscount William de Bosco! he stood barefooted and bare-headed, in his shirt, with a girdle of red tape round his loins, and a taper of full six pounds weight in his hand. His secretaries and his ushers were decently apparelled in guise of mourners (as well became them). Then the trumpets blew 'à-mort,' a long blast, and the crier made his 'oyez,' and the good Viscount spoke these words in a clear and manly voice, not without many sighs and inward groans:

Here stand I, William de Bosco, Viscount of this Viscounty of the County of Chancery, a humble comrade and brother of the Great Seal, and a true liegeman of the Most Noble Grand Master of the said Great Seal, Frederick, Seigneur du Sceau, and County of Chancery, whom God preserve! *Whereas* it hath been reported that I have spoken doubtingly of the skill of the valiant Knights of the Great Seal in archery, and have compared them, to their prejudice and disparagement, with the Archers of Westminster therein; now, I do hereby publicly and *ex animo* renounce, detest, and abjure from henceforth and for ever, these detestable, damnable, odious, and heretical doubts and comparisons aforesaid; and I do freely, fully, and voluntarily profess, declare, and openly say and affirm, that each and every Knight and Companion of the Great Seal is *ratione sigilli, et ipso facto*, really, truly, naturally and bodily, an able, capable, and sufficient Archer, whether on foot or on horseback, in hall or field, with

long bow or short bow, in light or in darkness, in wet or in dry, by night or by day, sleeping or waking, fasting or feasting, in Term or out of Term, in Chancery or out of Chancery, in town or out of town, in East or in West, in North or in South, any Law or Equity to the contrary in anywise notwithstanding; and I make this declaration in the natural, legal, and equitable sense of the words, irrespective of reason or common sense, putting my trust in the Great Seal only.'

The Knights and followers thereon made their obeisances, and by gestures showed their great contentment (all shouting or noise being forbidden by the Statutes of their Order). John de Gloster (the good Knight) spake a few comfortable and courteous words (as was his wont) to the good Viscount; and John de Wyckins openly declared and cried out— 'God help the good Viscount! I was present when thou spakest the words impugned, and I vow, by the Great Seal, that they were spoken, as it were aside, unadvisedly, without forethought or malice, and so gently that, for my own part, I never conceived they could be drawn into question.' 'Grammercy, good John! (quoth William) thou didst truly hear, mark, and well digest the said words.' With that they all avoided the Hall.

Herein all men may perceive the high stomach of the Knights; the 'bonhomie,' piety, equity, and humility and love of peace of the good Viscount; the fearlessness of the said John de Wyckins; and the great renown, state, and dignity of the valiant Confraternity of the Great Seal in the County of Chancery.

Notwithstanding these things, Sir Fitzroy de Kelly (called 'Le Grand Procureur'), and Sir Edwin James (the Less), and the other Archers of Westminster and good Knights would often say and maintain that Viscount William spake God's truth herein, and that he had but scant justice at the hands of his own Companions, and this they would offer to prove on the bodies of any of the said Companions before our Lady the Queen herself at Westminster whensoever.

THE NEW LAW-COURSE AT McGILL.

McGILL UNIVERSITY, MONTREAL,
February 22nd, 1919.

Editor Canadian Law Times:

Dear Sir,—You may find something to interest you in the two numbers of the McGill Daily which I send herewith.

We now offer at this University (in addition to the post-graduate courses for the LL.M. and the D.C.L.) the following courses in law:—

(1) *For the LL.B. a four-year course:* two years in Arts followed by two years in Law. Graduates in Arts, Science and Medicine may omit the two years in Arts. This course is of a widely educative character, designed to give men a sound knowledge of the principles of law.

(2) *For the B.C.L.:*

(a) A three years course in Common Law, together with Roman Law, Constitutional Law, International Law, etc.

(b) A three years course designed as a preparation for practice in this province.

(c) A four years course directed to the same end.

In future all students who intend to practise in this province, other than graduates and returned soldiers, are required to take the four years course.

The subjects prescribed for the four years are as follows:—

1919-1920—Constitutional Law, Jurisprudence, Sale of Moveables, Agency and Partnership, Bills of Exchange and Banking, Private International Law, Legal History (Common Law), Elements of Common Law, Real Property Law (P.Q.).

1920-1921—Roman Law, Obligations (Civil Law), Insurance, Shipping and Carriers, Corporations, Public International Law, Legal History (P.Q.), Civil Procedure (P.Q.).

1921-1922—Roman Law (special topic), Criminal Law and Procedure, Municipal Law, Law of Evidence, Real Rights (P.Q.), Wills, Substitutions and Trusts (P.Q.), Marriage Covenants and Minor Contracts (P.Q.), Civil Procedure (P.Q.), Law of Persons (P.Q.).

1922-1923—Roman Law (special topic), Criminal Law and Procedure, Real Rights (P.Q.), Successions and Gifts (P.Q.), Lease, Hire and Prescription (P.Q.), Civil Procedure (P.Q.).

Briefly, the first two years deal with a wide range of subjects of educative value and of general interest: the last two years concentrate upon the Civil Law and Civil Procedure of this province, and Criminal Law and Procedure.

The first two years cover the same ground as the last two years of the LL.B., with some additions. If the candidate was qualified at the beginning of this course to enter for the legal years of the LL.B., he may take the LL.B. at the end of the second year, and then two years later proceed to the B.C.L.

I question whether a more comprehensive course in law is offered anywhere in the world. It may be overcrowded. Time will show.

Yours, etc.,

R. W. LEE,
Dean of the Faculty of Law.

CURRENT COMMENTARY UPON RECENT ENGLISH AND CANADIAN DECISIONS.[1]

The number of [1919] 1 K. B. for January, consisting of only 55 pages, contains nothing requiring notice here.

Master and Servant—Master's liability for servant's act done in course of employment. [1919] 1 Ch. for January, also a short number consisting of only 51 pages, opens with the case of *Joseph Rand* v. *Craig*,[2] in which the Court of Appeal unanimously affirm the proposition of law that a master is only liable for the wrongful act of his servant done in the course of his employment, and that this qualification implies that the act is done for the master's benefit, and not solely for the benefit of the servant. The action was for an injunction, and the defendant was a contractor for the removal of rubbish, who employed carters for that purpose.

The following extract from the judgment of Swinfen Eady, M.R., states the facts on which the question of law arose in the clearest possible way:—

"They (the carters) are employed by the day, and they are paid at the end of the day for the day's work. . . They were employed to cart away from, and to, defined premises, and they were given authorized permits that enabled them to shoot there the rubbish they so carted. Now it is proved . . . that in certain cases persons in the employ of the defendant, for their own purposes, and deliberately, instead of taking their loads of rubbish to the premises on which the ticket enabled them to unload, took them to the plaintiff's premises and shot the rubbish there. . . . The acts of which they were guilty were acts done deliberately of their own choice and to effect a purpose of their own, and in opposition to the express instructions of their employer. The purpose

[1] The aim of the Editor is to make this feature of the C. L. T. a really complete and conscientious review of recent English decisions likely to be of use to Canadian lawyers, so that readers of it from month to month may rely on no case important for them to be advised of, escaping their notice. Cases under the English *Workmen's Compensation Act 1906*, are not considered as coming under this category.

[2] [1919] 1 Ch. 1.

of their own suggested was probably either to indulge their laziness or to give them an opportunity of spending an extra time in the public-house, but at any rate it was entirely a purpose of their own. The acts of which they were guilty were their own deliberate acts. It is not a case of carelessness or negligence in the course of their employment. In my judgment it is a case, on the facts proved, of departing from the course of employment, and for their own purposes deliberately committing the acts in question. Under these circumstances I am of opinion that . . . on the facts so proved the trespasses complained of were not acts done in the course of the employment of their master for which he can be rendered liable.'

Will—Assignment by way of Mortgage of Plaintiff Beneficiary's Interest before Action — Personal Liability of Plaintiff for Costs — Priority between Costs and Mortgage. The only other case requiring notice is *In re Pain, Gustavson* v. *Haviland*,[8] where Younger, J., to quote the headnote, decided that—

The claim of an assignee under an assignment by a beneficiary of an interest in a trust fund under a will, the assignor not being a trustee of the fund and the assignment being duly notified to the trustees, has priority over a claim by the trustees against the assigned interest for a debt incurred by the assignor to the trustees since the assignment. But the assignee will lose his priority if he stands by, *e.g.*, in an action by the assignor against the trustees for an account, and allows the debt, *e.g.*, costs payable by the assignor to the trustees, which he could have prevented, to be incurred.

Counsel for the trustees claimed that the costs must rank in priority to the claims of the assignee, on the broad ground that the trustees were entitled, irrespective of any assignment by the plaintiff, to retain out of every original interest of hers under the will of the testator any sum which, before distribution, became payable by her to them as trustees, and that whether the assignment was absolute or by way of mortgage, whether it was made before or after the liability was incurred, whether, if the liability was in respect of the costs of an action against trustees, the assignee was a party to the action or not.

Younger, J., says (p. 44):

"Since sec. 25 of the *Judicature Act* of 1873 was passed," (our R. S. O. 1914, c. 109, s. 49 "it is difficult to see how the contention

[8] [1919] 1 Ch. 38; 87 L. J. (Ch.) 550.

is tenable with regard to assignments falling within it and not being assignments by trustees. And the assignments in the present case do not fall within that section; for, although prior to that Act the interest of the plaintiff in this case, being properly recoverable only in a Court of Equity, was strictly "a chose in equity," not cognisable in a Court of Law, the expression in the section "legal choses in action" includes choses in equity within its scope. These, since *King* v. *Victoria Insurance Co.*[4]. . . have been treated as including "all rights the assignment of which a Court of Law or Equity would before the Act have considered lawful;" or, in the words of Channell, J., in *Torkington* v. *Magee*,[5] as including a "debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with as being assignable." And the effect of a duly notified assignment to which the section applies, and, be it noted, whether by way of mortgage or absolutely, is no longer in doubt."

CANADIAN DECISIONS.[1]

Company incorporated under Saskatchewan Companies Act — Memorandum of Association — Doing Business in Ontario—Ultra vires. In the number of 43 O. L. R. for January, the only case requiring special notice seems to be *Weyburn Townsite Co. Ltd.* v. *Honspurger*.[2] There a company was incorporated under the Saskatchewan *Companies Act* by memorandum of association, stating "the objects for which the company is established are to carry on real estate, loan, and general brokerage business." In 1912 two of its chief executive officers, being in Ontario, made a verbal agreement on October 15th of that year with the defendant, at St. Catharines, in that province, that he should purchase certain lands of the company in Saskatchewan for $4,000, and the defendant then and there gave them a promissory note for $1,000 to cover the first instalment of the purchase price. Afterwards the two officers of the company returned to Saskatchewan, had a written agreement evidencing

[4] [1896] A. C. 250, 254.

[5] [1902] 2 K. B. 427, 430-1.

[1] As most of our subscribers have ready access to the Canadian Reports, it is not deemed necessary to review the Canadian cases in the same detail as the English. Only those which seem of special interest and importance will, therefore, be noticed.

[2] 43 O. L. R. 451.

the sale drawn up, and sent it to the defendant with a letter dated October 24th, 1912, to be executed by him, which it was, and returned by him to the company. The present action was for specific performance of the agreement. On February 28th, 1918, the plaintiff company for the first time procured a license under the Ontario *Extra-Provincial Corporation Act* authorizing it to carry on real estate business in Ontario. Masten, J., held the contract *ultra vires* of the plaintiff company, and distinguished *Bonanza Creek Gold Mining Co.* v. *The King*.[8] He says (pp. 460-1):—

"Where the incorporating authority itself has only a limited power of incorporation, the general words of the charter or memorandum of association must be read subject to that limitation, for the company can possess no greater powers than its creator has power to bestow on it. The plaintiff company, being incorporated by the Province of Saskatchewan under its general *Companies Act* of 1912, possessed only such powers and capacities as could be bestowed upon it in that province under the provisions of that Act. By the *British North America Act*, the province has power to incorporate companies with provincial objects only. In *Bonanza Creek Gold Mining Co.* v. *King*, *supra*, the Privy Council determined that the words 'legislation in relation to the incorporation of companies with provincial objects' preclude the grant by the incorporating province "of powers and rights in respect of objects outside the province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted *ab extra*." In that case it was held that the Bonanza Creek Company was incorporated as a common law corporation by the exercise of the Royal Prerogative, and, having been adequately called into existence, it had applied for and received from the local authorities of the Yukon all necessary powers. But the facts in the present case are entirely different, and I am unable to arrive at any conclusion other than that the plaintiff company did not by its constituting instruments acquire subjectively any powers or rights in respect of objects outside Saskatchewan; in other words, that the implied permission to carry on its business generally, which, in view of the general recognition of the doctrine of comity, would have been conferred on this company if incorporated by plenary sovereign authority, is not possessed by it owing to the limited power of incorporation exercisable by the Province of Saskatchewan. The company having no implied permission by its charter to operate outside of Saskatchewan, the Courts of Ontario could not, by comity alone, recognize its contracts made here."

[8] [1916] A. C. 566.

As to the license under the Ontario *Extra-Provincial Companies Act* he held that it conferred powers as from its date only, and did not operate from the time when the company entered Ontario so as to validate its subsequent corporate Acts. He says (p. 464):—

"In my view, the Act, coupled with the license, yields two results: First, with respect to claims and rights of any foreign company validly acquired under the doctrine of comity at or prior to the date of the license, it enables the company to have access to the Courts of Ontario for their enforcement and removes the bar created by sec. 7 of the Act;[4] second, as and from the date of its issue it confers *de novo* on the licensed company such rights and powers as are specified in the license (if the company has capacity to accept such rights and powers)."

He further holds that sec. 13 (a) added to the Saskatchewan *Companies Act* by an Act of 1917, and providing that a company created by or under the authority of the *Companies Act* shall, unless a contrary intention is expressed in the memorandum of association, have and be deemed to have had since incorporation the capacity of a natural person to accept extra-provincial powers and rights, and to exercise its powers beyond the boundaries of the province to the extent to which the laws in force where such powers are to be exercised permit, was, as regards acts done prior to the passing of the Act of 1917, as against a citizen of Ontario, beyond the powers of a provincial legislature. As to this he says (p .467):—

"The contract was wholly *ultra vires*, and was not binding either on the plaintiff company or on the defendant; apart from all other defences, it was void for want of mutuality. Being, therefore, a contract which neither party could specifically enforce, how then can the Legislature of Saskatchewan in 1917 pass legislation which shall indirectly have the effect of conferring on the plaintiff company a valid right of action in the Courts of Ontario against an Ontario citizen? The case seems to me to fall directly within the principles enunciated in the decision by the Privy Council in the case of *Royal Bank of Canada* v. *The King*.[5]

[4] Sec. 7 'No Extra-Provincial Corporation coming within class 7 or 8 or 9 shall carry on within Ontario any of its business unless and until a license under this Act so to do has been granted to it, and unless such license is in force; . . .

[5] [1913] A. C. 283, at p. 298.

The number of 55 R. J. Q. S. C. for January seems to contain nothing calling for special notice.

Crown Lands—Adverse Possession—Grant from Crown. In the number of 43 D. L. R. issued on January 2nd, the only case which seems to invite special notice is *Walsh* v. *Smith*,[e] where the important question to be decided was whether the Crown could make a grant conferring title to land and giving the grantee a right to the possession of that land against all the world, including the defendant, an intruder who, at the date of the grant, was in possession, and who by himself or his predecessors in title had been in possession for more than twenty years, but less than sixty years, which last is necessary to give title as against the Crown. The full Court answered this question in the negative (Russell, J., apparently *dubitante*), holding that the defendant could not be ejected, there being no judgment in intrusion, and, also, it would seem inclining to hold that while the defendant and his predecessors in title had not acquired a title under the Statute of Limitations against the Crown, his actual adverse possession for more than twenty years was good as against the plaintiff, the Crown grantee.

The number of 44 D. L. R. issued on January 15th contains a valuable annotation by Mr. J. D. Falconbridge on *Insurance on Mortgaged Property.*

[e] [1918] 43 D. L. R. 648.

CONTEMPORARY LEGAL REVIEWS AND PERIODICALS.[1]

In its Dec.-Jan. number the *Illinois Law Review* brings out a second instalment of *Celebration Legal Essays* in honour of John H. Wigmore in all respects worthy of the first instalment, which we commented on in our issue of last November, but this time confined to subjects of International Law and Public Law. We will begin with the illuminating article by Mr. H. J. Randall on *The Beginnings of English Constitutional Law.* As the writer says, 'no serious attempt appears to have been made to trace the development of the constitutional theories as distinct from the history of the constitution itself;' and his object is 'to begin the history of our constitutional theory with a brief account of the earliest writers on the subject.' He then proceeds to deal with Sir John Fortescue's *Governance of England,* of the later 15th century, and his theory of the difference between "*dominium regale,*" and "*dominium politicum et regale,*" which is 'undoubtedly the most original contribution of Fortescue to political thought,' while 'upon the practical side the two great questions that are always before the mind of Fortescue are those of finance and of administrative order.' Next, after referring to More's *Utopia* (temp. Henry VIII.) only to say that 'for the student of constitutional history its importance is of the smallest,' Mr. Randall proceeds to discuss St. German's famous *Doctor and Student* (1531), pointing out that St. German 'writes purely from the standpoint of a lawyer, he neither professes to expound a theory of politics nor to describe the working of the Constitution, but his work is of greater interest for that very reason.'

[1] It is by no means the intention of the C. L. T. to make this monthly feature a mere jumble of extracts. Numerous exchanges from different parts of the Empire and from the United States are examined, and attention is called, month by month, to whatever seems most striking and important in them.

Next we are introduced to Sir Thomas Smith's *De Republica Anglorum*. (1583). It and Fortescue's *Governance of England* 'can both be classed as essentially studies in comparative politics, written by men who had observed the comparative working of institutions with their own eyes.' 'If he had any abstract theory on the subject (of the State)—which he almost certainly had not—he would probably have agreed with those modern writers of the Benthamite school who regard the State as a justice-enforcing institution;' 'of general political theory the work contains little of moment and nothing of much originality. Then after mentioning sundry minor works also of the 15th and 16th century which, however, contain nothing of constitutional theory, or next to nothing, and adding a short note on the Book of Common Prayer, and 'the very striking fact about it, namely, the total absence in the entire liturgy of any reference to Parliament,' Mr. Randall speaks, at some length, of Hooker's *Ecclesiastical Polity,* and the constitutional theory in Book VIII., of which he says:—

'In fact it is the most thorough, and only really philosophic defence of our institutions that the 16th century produced. It contains in germ a large part of the "classical" theory originated by Locke, and it is hardly too much to say that it gave the tone to constitutional apologists for the next 250 years.'

Hooker 'holds to the medieval doctrine that the law is above the King, not the King above the law;' and we are shewn how he expounds it. Finally the comments of foreign 16th century observers upon the English Constitution are briefly referred to. In the next century are 'Hobbes, Locke, Harrington, and Algernon Sidney with definite and comprehensive treatises on political theory. Such things were not characteristic of the England of the 16th century.'

Space will not permit notice of equal length of the other articles in this remarkable issue of the *Illinois Law Review.* We have, following the last, a long article by Mr. Angus J. McGillivray, now of the Justice Department, Ottawa, in which he discusses with

ability *Dominion and Provincial Powers under the British North America Act, 1867,* in the light of the leading Privy Council decisions. We notice incidentally that he declares the question raised by the late Sir John Thompson in his reports as Minister of Justice, which are quoted from at length, 'as to the right of the Parliament of Canada under the powers granted to Canada by the British North America Act to enact laws supreme and unrestrained by any law passed by the Parliament of Great Britain before that Act was passed,' remains undetermined. No doubt this is true, but Sir John Thompson could, we suppose, easily have had it determined by having an Act passed in the Dominion Parliament repealing, as regards Canada, the Imperial *Copyright Act,* 1842, but he never cared to put the matter to the test. As to what Mr. McGillivray says about the recent Manitoba decision of *Walker* v. *Walker,* that the Dominion Act of 1888, in declaring in force in Manitoba the laws of England relating to Dominion subjects of legislative powers as the same existed on July 15th, 1870, had the effect of introducing into Manitoba the English *Matrimonial Causes Act, 1857,* with the power to grant divorces therein contained, we fail to follow his meaning. There is nothing at all in *Walker* v. *Walker,* we think, questioning the power of the Dominion Parliament to take away this power to grant divorces from the Courts in Manitoba at any moment.

The number begins with an Article by Mr. Th. Baty, the author of *International Law* (London, 1909). and of *Polarized Law* (London, 1914), entitled *The Interconnection of Nationality and Domicile,* in which he advocates a new criterion of Nationality, in place of the existing *race* or *place* criteria, namely, the criterion of place of education. Thus he says:—

'Would it not be a useful criterion to adopt, if we said that the education of the child up to its 14th year was decisive? If it has, during that impressionable period, been brought up among schoolfellows of the locality, has learned their language, and played their games, can it be doubted that the country has probably

acquired that strong hold on its knowledge and affections which entitle it to its allegiance? If, on the other hand, the parent is not one of a crowd of immigrants, but is living in a detached way, educating his children by a governess as tutor, or sending them to a foreign school, it is probable that the continuance of the old tie may be presumed.'

Russia, however, it appears is the only country where education has so far been recognized as having a direct bearing on nationality. It has not been even there admitted as the sole and sufficient criterion, but its importance was admitted as an exception to the general rule that children follow the nationality of their parents. Birth in Russia would not of itself make an exception in the case of foreign parentage; but birth and education might, if such persons chose, that is, they were recognized as having a municipal right to claim Russian nationality.

Next there follows a complete translation of Huber's *De Conflictu Legum*, by Professor Ernest G. Lorenzen, of Yale University, preceded by a most learned dissertation upon Huber's views on the subject of Private International Law, as it is generally termed, and a comparison of them with those of other leading authorities. Huber's treatise, says Professor Lorenzen, 'has had a greater influence upon the development of the Conflict of Laws in England and the United States than any other work.' We are specially interested to see Professor Lorenzen's reference to what Mr. Frederic Harrison says about Ulrich Huber in some famous lectures upon the Conflict of Laws which originally appeared in the *Fortnightly Review* as long ago as 1879, because these lectures, together with some others on *Jurisprudence*, in which the theories of Austin and Maine on Sovereignty, and Austin's Analysis of Law, and the Historical Method of Jurisprudence are discussed, which also appeared about the same time in the *Fortnightly Review*, are now for the first time to be published in separate form, revised by Mr. Frederic Harrison himself, by the Clarendon Press. The volume may be expected to

appear in less than two months, and we believe will be heartily welcomed by every Law School, and University possessing a Law Faculty, throughout the English-speaking world.

Then the *Illinois Law Review* gives us an Article by William G. Hastings, Dean of the University of Nebraska Law School, on *Montesquieu and Anglo-American Institutions*, in which he avers that a far more important generalization was put forth by Montesquieu in regard to English institutions than his famous tripartite division of the government into legislative, executive, and judicial, namely—

'The proposition clearly set forth in the *Esprit des Lois* that the fundamental principle on which English institutions have been developed is individual liberty, and that the basis for this leading principle is the solidity of property rights and equality of the citizen in regard to them. . . . The basis for attributing to Montesquieu the position of the generalizer of English institutions rests upon his declaration that liberty is their main thesis, and that the doing of that which is permitted by law, *i.e.*, the upholding and maintaining of property rights in whomsoever those rights inhere, is the essence of such liberty.'

Dean Hastings then devotes himself to the influence of this generalization upon American statutes and Constitutions. He contrasts with the basal conception indicated by it, what he terms "imperial government," and concludes by saying—

'It is clear as anything can be that in order to maintain an effective modern State, able to take care of itself in a more or less predatory modern world, a power, call it police power, imperium, dominium, or what you will, must be found that can provide for the common defence and promote the general welfare.'

Lastly, we have a very long Article by Mr. John M. Zane, entitled *A Legal Heresy*. The supposed "legal heresy" is found in some words of Mr. Justice Holmes in a Supreme Court case where he says—

"A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

"The principle asserted here," says Mr. Zane, "is that no law can create a legal right against the government." But with all respect this is not what Mr. Justice Holmes says at all. Mr. Zane repeatedly speaks as though Mr. Justice Holmes was talking of the government in the sense of the executive, or of government officials of one kind or another. And in respect to the passages cited from Hobbes, we really don't think it is Hobbes who is "muddled," to use Mr. Zane's own word. Nor do all the recondite citations with which Mr. Zane says the Carlyles have furnished him, affect the matter in the least. What Mr. Justice Holmes is speaking of is the "Sovereign," meaning the sovereign power in the State; he is not saying anything about "the Government." Neither does the statement attacked predicate anything about the necessity of there always being a sovereign power in the State, as Mr. Zane seems to think; nor does it say that such a sovereign power when it exists *ought* not to obey the law, but only that it is not *bound* to obey the law, which it seems to us one must be very "muddled" to deny. Surely Mr. Zane will admit that a right which cannot be enforced cannot be a *legal* right, though it may be a *moral* right; and if so, most certainly, "there can be no legal right as against the authority that makes the law on which the right depends;" and we totally fail to see that, because we so say, "we may as well apologize to Germany at once for daring to question the divine right of government to override every law." It is not "divine right" or "moral right" but "legal right" that is being spoken of.

We must not admit, also, to mention the very careful review of Professor Geo. E. Howard, of the University of Nebraska, of Rudolph Huebner's *History of Germanic Private Law,* constituting as it does a valuable analysis of a great part of what appears to be justly called by the reviewer 'one of the most valuable

contributions to judicial literature which has appeared in recent times.

We have noticed this Second Instalment of the Wigmore "Celebration Legal Essays" of the *Illinois Law Review* at unusual length, because, if we may say so, they abundantly deserve it; and it is rare indeed to find in any legal periodical a collection of articles of such substantial value and abundant learning.

We wish to call attention to the Article on *The Theory of Popular Sovereignty* by Professor Harold J. Laski, of Harvard, being specially attracted by the clearness of vision for actual facts which the writer displays, and the courage with which he faces them. A few extracts will illustrate what we mean. Referring to Rousseau's doctrine that sovereignty is in the people as a whole, he says:—

'What, in fact, Rousseau's system, like any other, does is to leave power in the hands of that minority which is able most effectively to manipulate the will of the inert mass of the population. It is clear, in brief, that popular sovereignty, if it means that the whole people is, in all but executive detail, to govern itself, is an impossible fiction. . . . Dr. Bosanquet, like Rousseau, makes government simply an instrument for effecting the will of the sovereign state; but he gives us no means of knowing when that will has received expression. . . . Certainly it must be admitted that the theory of representation contains much that is the merest fiction. It is often difficult to know upon what issues a member has been returned. There are innumerable problems upon which, in any real sense, a public opinion cannot be said to exist. . . . We seem, on the whole, determined that there shall be no restrictions upon the franchise; but not even the enthusiasm of Mill has convinced us that opinions ought to have their place in the assembly proportionately to their strength. In the result, there are many opinions that do not get represented at all; and the majority actually exerted by the party in power may be out of all relation to its strength in the country. . . . In every country in the world the pressure of public business has made the legislative body little more than the creature of the executive. . . . Even in America where the theory of the separation of powers has given an immense safeguard to the legislature, the growth of presidential influence has been immense. . . . It is obvious enough that the average elector is not greatly interested in the political process. He demands results, but he does not greatly care about the methods by which those results are attained. It is sometimes

difficult to doubt that we approach the epoch so greatly feared by de Toqueville when he predicted that men might one day be willing to exchange power for material comfort. In that event the sovereignty of the people would be more than an antiquarian memory. . . . He (the political philosopher) will, in fact, be driven to the perception that, politically, there is no such thing as sovereignty at all. He will find himself, rather, in the presence of different wills, some of which, from their strength have more importance than others. He will ascribe to none a moral pre-eminence by the mere reason that it claims political priority. He will be satisfied simply with the ascription to these wills of a power which is never constant and rarely capable of prophetic announcement.'

Other Articles in this issue of the *Michigan Law Review* are on *Domestic Corporate Tangible and Intangible Property,* by Frederick M. Thulin, of Chicago; and on *Federal Incorporation,* by Myron W. Watkins, of the University of Missouri.

The *Solicitors' Journal and Weekly Reporter* for January 4th, contains an Article on *Donations Mortis Causa,* in which it aims at showing that 'there are inconsistencies in the cases which it seems impossible to explain on any intelligible, or at least, on any convenient ground, and which might well receive the consideration of the Legislature.' It also reprints the following letter from Sir T. Erskine Holland to the *Times* of December 23rd, which just because it is a letter of Professor Holland's will interest many readers:—

Sir,—Demands for the punishment of the ex-Kaiser have produced many "curiosities of literature." sometimes even over the signatures of men deservedly respected as authorities upon subjects which they have made their own; but *ne sutor supra crepidam.* Dr. Holland Rose, for instance, wrote of the Kaiser as guilty of "an indictable offence." Sir Herbert Stephen naturally protests against this misuse of terminology, which is, indeed, far more specifically erroneous than was the popular application, which you allowed me to criticize, of the terms "murder" and "piracy"

to certain detestable acts perpetrated under Government authority. He goes on to give an elaborate, though perhaps hardly necessary, explanation that breaches of that generally accepted body of rules to be followed by States *inter se,* which is known as "international law," can be enforced, in the last resort, only by hostile State action—a fact which he seems to suppose may entitle him to qualify the rules as "a mockery."

Sir Herbert then proceeds to give an account of the so-called "private international law" which surely needs revision for the benefit of any "man in the street" who may care to hear about it. Sir Herbert defines it as "that part of the law of each separate country, as administered in its own Courts, which deals with international matters," and he enumerates as such matters "prize, contraband, blockade, the rights of ambassadors." In fact, none of these matters are within the scope of "private international law," but are governed by "(public) international law," non-compliance with which by the Courts or subjects of any State is ground for complaint for the Government of any other State thereby wrongfully affected.

The so-called "private international law," better described as "the conflict of laws," deals, in reality, with the rules which the Courts of each country apply, apart from any international obligation, to the solution of questions, usually between private litigants, in which doubt may arise as to the national law by which a given transaction ought to be governed—*e.g.*, with reference to a contract made in France, but to be performed in England. There is here a "conflict," or "collision," of laws, and it is decided in accordance with rules adopted in the country in which the litigation occurs. These rules have no "international" validity, and the term is applied to them, merely in a popular way, to indicate that a Court may have in

some cases to apply the law of a country other than that in which it is sitting. The unfortunate opposition of "public" to "private" international law has to answer for much confusion of thought. "International law," properly so called, has, of course, no need to be described as "public" to distinguish it from rules for solving the "conflicts" of private laws, which are "international" rules only in the sense that laws are sometimes applied in countries other than those in which they are primarily binding.—I am, sir, your obedient servant, T. E. HOLLAND.

Oxford, 19th December.

Among new exchanges we have to acknowledge the *Washington Law Reporter* whose January issues have reached us; and the *United States Supreme Court Advance Opinions.*

A. H. F. L.

CORRESPONDENCE.

Editor Canadian Law Times:

Sir,—"He is splendid, but they don't give him a chance." This was the comment of a social worker about the Commissioner of the Juvenile Court.

I hold no brief for the Commissioner, but it is time somebody took up the cudgels for the Juvenile Court, which is the wisest and most beneficent institution in the city; and as a citizen, I must enter my emphatic protest against the treatment which this Court has received at the hands of the Aldermen, and a certain section of the press, ever since the present Commissioner was appointed. Three points stand out prominently:

First—The criticism of the Commissioner always breaks out immediately after the dismissal of an employee, and it is always voiced by one man.

Secondly—This criticism appears, on the face of it, to be unintelligent. The chief cause of complaint is the number of adjournments, which, all thinking people will agree, should be the outstanding feature in a well-conducted juvenile Court—the object of which is to cure, and not to punish.

Thirdly—The treatment of the press is most unfair. One sample may be quoted: Recently an evening paper proclaimed in large type that Judge Hodgins had stated that the Juvenile Court was inefficient, and in the next issue there appeared, hidden away in a corner, a letter from Mr. Justice Hodgins stating that he had never said any such thing.

It is difficult to understand the motives of people who go out of their way to injure the Court and harry the Commissioner who, God knows! must have enough in his daily routine to worry him, and keep his mind full from morning till night.

It is conceivable that candidates for the office should take such a step or that dismissed officials should want by any means to get even, but for these people and for every honest critic of the Court there is a proper course to adopt. The appointment of the Commissioner does not lie with the City Council, but with the Attorney-General. If there is anything wrong with the conduct of the Court, the Attorney-General is the man to whom the complaint should be made. There is no reason to doubt that he will give to every communication the attention it deserves. Nobody has suggested that he is incapable or asleep.

On this point there can be no two opinions, that it is distinctly against public interest for any Alderman or newspaper to do anything that will lower respect for the Court, hamper the judge in his work, or manufacture an adverse public opinion. It is true that this must, to a great extent, have been the result of what has been said and done; but, at the same time, the respect and admiration of many people has been increased for the devoted judge, who has faithfully stuck to his job on a mere pittance, in spite of the difficulties which have been continuously thrown in his way.

Yours, etc.,

ERNEST HEATON.

Toronto, February 25th.

NEW BOOKS AND NEW EDITIONS.

Grotius Society Publications, No. 1, International Rivers: A Monograph based on Diplomatic Documents: by G. Kaeckenbeeck, B.C.L., of Magdalen College, Oxford. With an Introductory Note by Henry Goudy, D.C.L., Regius Professor of Civil Law in the University of Oxford. Published for the Society, by Sweet and Maxwell, Limited: 3 Chancery Lane, London, W.C. 2, 1918. Also maps to accompany same: Issued by the Grotius Society by the permission of H.M. War office.

The author of this attractive looking little book is a young Belgian who soon after the outbreak of the war came to Oxford and took up study in the Law School there. He had previously had a distinguished career at the University of Brussels, and had also served for a short time in the Belgian Army till delicate health forced him to retire. At Oxford he achieved high academic honours, and is now engaged in tutorial work at Magdalen College, and under the Non-Collegiate Delegacy with much acceptation. Professor Goudy's Introductory Note assists us much in dealing with this book. The scheme and method of it is explained in the author's Preface. He claims it as simply an attempt to bring together and connect such information—scattered in numberless documents—as may be of value to statesmen, diplomatists, and students of International Law, with regard to the questions raised by the existence of International rivers. His object has been to bring together the materials whence knowledge can be gathered rather than of imposing conclusions without giving the premises. He deals together with the two questions of the opening up of an international river to the flags of all nations equally, and of the administrative arrangements between the riparian governments for the unification of the régime of the river, its supervision, the construction of the necessary works, etc. The bewildering mass of provisions in treaties, conventions, etc., dealing with international rivers since the beginning of last century are subjected to

a careful examination and analysis, and, so far as important, placed before the reader in a clear conspectus, —a thing which, Professor Goudy says, so far as he knows, has never been attempted before. We can well believe, with Professor Goudy, that at the Peace Congress and at all meetings of diplomats, statesmen and jurists for regulating the questions that will arise regarding International Rivers in the future, Mr. Kaeckenbeeck's book will be found of the greatest service, if not indispensable.

Carnegie Endowment for International Peace. Division of International Law. The Armed Neutralities of 1780 and 1800. A Collection of Official Documents preceded by the views of Representative Publicists. Edited by James Brown Scott, Director: New York: Oxford University Press: American Branch: 35 West 32nd Street: London, Toronto, Melbourne, and Bombay, 1918, Pp. xxxi+698: Net $5.

This is a most valuable volume for all concerned with International Law, and a great credit to the International Law Division of the Carnegie Endowment for International Peace. The volume issued by the Division some time ago entitled *The Controversy over Neutral Rights between the United States and France, 1797-1800,* dealt with American precedent for armed neutrality. The present volume deals with European precedent. 'The position of the neutral,' says Theodore Dwight Woolsey, in a passage of his famous *Introduction to the Study of International Law,* cited in the present volume, 'gives rise to rights, which may be defended against attempted aggressions of a belligerent by armed forces, and several neutrals may unite for this purpose. This is called an armed neutrality, of which the two leagues of the Baltic Powers in 1780 and 1800 furnish the most noted instances.' The texts of the agreements constituting the armed neutrality of 1780 and of 1800, together with the orders putting them into effect and diplomatic correspondence bearing thereon, are reproduced in the present volume. No less than 161 official documents are

included in whole or in part, and nearly all in whole. The originals of most of these documents being in foreign languages, English translations, wherever available, have been used, and in other cases English translations have been made especially for this volume. And as it is very important that the origin, nature. and effect of armed neutrality should be understood, the views of accredited American and foreign publicists dealing with this matter have been collected and are printed at the beginning of this volume: Alvarez, Berbbohm, Bluntschli, de Boeck, Boye, Calvo, von Dohm, Geffcken, Hall, Heffter, Katchenovsky, Klean, de Louter, Manning, Martens, Matzen, Nys, Perels, Phillimore, Pradier-Fodéré, Prittwitz u. Gaffron, Rivier, Trescot, Twiss, Walker, Wehberg, Westlake, Wharton, Wheaton, Woolsey,—in truth a goodly collection. The footnotes contained in the works from which extracts have been taken are, as a rule, reproduced textually except when they point to the source where documents under discussion are to be found. In such cases the references are to the pages of this book.

Carnegie Endowment for International Peace: Division of International Law: The Treaties of 1785, 1799, and 1828, Between the United States and Prussia, as interpreted in Opinions of Attorneys-General, Decisions of Courts and Diplomatic Correspondence; Edited by James Brown Scott, Director: New York: Oxford University Press: American Branch: 35 West 32nd Street: London, Toronto, Melbourne and Bombay, 1918. Pp. viii+207: Net $2.

At the time when, on February 3rd, 1917, all diplomatic relations between the United States and the German Empire were severed, by reason of the German Government having on January 31st, 1917, informed the United States that—

> from February 1st, 1917, all sea traffic will be stopped with every available weapon and without further notice in the following blockade zones [describing them in detail] around Great Britain, France, Italy, and in the Eastern Mediterranean.

there were three treaties in force which, in whole or in part, in the opinion of the German Empire and of the United States affected their international rela-

tions. These were: First, the treaty of amity and commerce concluded between Prussia and the United States of America on September 10th, 1785; secondly, the treaty of amity and commerce concluded between Prussia and the United States of America on July 11th, 1799; and thirdly, the treaty of commerce and navigation concluded between Prussia and the United States of America on May 1st, 1828: and these treaties had been held by the governments of the contracting parties to apply not only to Prussia, but to the North German Confederation, of which Prussia was the leading member, and also to the German Empire, of which the King of Prussia was the German Emperor. These treaties, with the exception of two Articles in that of 1799, relating to certain rights of merchants and other subjects of the two contracting parties, and of the treatment to be accorded to prisoners of war, in the event of war arising between the two contracting parties, were suspended or abrogated by the outbreak of war following the action of Congress on April 6th, 1917. They, together with the opinions of the Attorneys-General of the United States, the decisions of the Federal Courts and the correspondence between the German Empire on the one hand and the United States on the other, relating to their nature and binding effect, were collected from official sources and issued in pamphlet form by the Division in March, 1917. They have, however, a distinct place in international law, especially in its historical aspect, as well as in the relations of the two contracting countries, and this pamphlet is now, most laudably, reissued in revised and permanent form in the present volume. We have first the three treaties, then the decisions of federal Courts in eight cases arising under them, or in matters to which they have reference, then the Opinions of Attorneys-General of the United States, viz., that of August 19th, 1868, in the case of Deserters from the Prussian Frigate *Niobe*, that of September 19th, 1885, on Tonnage Duty, and that of November 13th, 1894,

on the Duty on Imported Salt, then an extract from the Proclamation of the President of the United States of August 22nd, 1870, in reference to the situation which had arisen from the Franco-German war, then Diplomatic Correspondence in connection with Claims relative to tonnage dues, the Case of the *William P. Frye*, and the *Case of the Appam*, and lastly, a communication from the Minister of Switzerland to the Secretary of State of February 10th, 1917, respecting the proposal of the German Government for an addition to the Treaty of 1799, respecting the treatment of the subjects or citizens of the two States and their property in the event of war between them, and the reply thereto of the Secretary of State, declining to enter into further engagements with the Imperial German Government, in view of the flagrant violations by the German Government of the existing provisions of the treaties of 1785 and 1799. A. H. F. L.

Les Conventions et Déclarations de la Haye de 1899 et 1907, accompagnées de tableaux des signatures, ratifications, et adhésions et des textes des réserves, avec une introduction de James Brown Scott. New York: Oxford University Press. 1918. (Dotation Carnegie pour la Paix Internationale).

The present volume is one more item in the long list of publications in respect of which students—especially of international law—are so much indebted to the Carnegie Foundation for International Peace.

The volume is one of a series of French editions of works already published in English by the Endowment. It contains no new material, but it is not untimely, when the Society of Nations is in travail and men are looking for a new birth of international law, to publish the text of the conventions and declarations agreed upon at the Peace Conferences of 1899 and 1907.

The habit has become too common during the last four years to belittle the Hague conventions and international law generally. It is true that most of the conventions contain a provision that they are binding

only upon contracting parties (that is, upon States which have ratified them), and only if all the belligerents are contracting parties. It is, however, frequently forgotten that in most respects the conventions merely declare the existing rules of international law, and that in so far as the conventions are not technically binding, the rules which they were intended to supersede remain in full force.

It is true also that the rules of international law have been frequently broken during the present war, but one cannot argue from the breach of law to the non-existence of law. The punishment of the chief criminals has been long delayed, but one can hardly doubt that as a result of the present war international law will be reinforced by the new sanction afforded by the united force of the law-abiding nations.

One may admit that the Hague conventions and the existing rules of international law will have to be revised without admitting that the two Peace Conferences were useless. When a new conference for the revision of international law meets its labours will be immensely facilitated by those of its predecessors.

JOHN D. FALCONBRIDGE.

We have also received:—

The American Journal of International Law: A Quarterly: Volume 12, No. 4: October, 1918: Published for The American Society of International Law by Oxford University Press: 35 West 32nd Street, New York, U.S.A. And Supplement thereto, containing Official Documents.

Among the contents are Articles on *Change of Sovereignty and Concessions*, by Francis B. Sayre; *Treatment of Enemy Aliens*, by James W. Garner; *The Neutrality of Switzerland: III.*, by Gordon E. Sherman; and *The Hellenic Crisis from the Point of View of Constitutional and International Law: V.*, by Theodore P. Ion.

International Institute of Agriculture: Bureau of Economic and Social Intelligence: International Review of Agricultural Economics: Monthly Bulletin of

Economic and Social Intelligence: for August and July, 1918: Rome: Printing Office of the Institute, 1918.

In the House of Representatives: H. R. 13324: In the Matter of the Investigation of the Packing Industry: Testimony of J. Ogden Armour on behalf of Armour and Company, January 21st, 1919, before the Committee on Interstate and Foreign Commerce.

Committee on Professional Ethics of the New York County Lawyers' Association: Questions respecting Proper Professional Conduct with the Committee's Answers: Supplement No. 1. Rooms of New York County Lawyers' Association: 165 Broadway, New York City, N.Y.

A. H. F. L.

THE GAZETTES.

The *Canada Gazette* for January 18th contains an Order in Council providing that no conviction for any offence against the Orders in Council and Regulations relating to unlawful associations and publications shall be had unless the prosecution has been assented to or approved by the Attorney-General of the province in which the offence is alleged to have been committed; and that the proceedings shall be by way of indictment, unless the accused consent to summary trial before a magistrate.

The *Canada Gazette* of February 8th contains a list of those who are eligible to appointment to the Military Division of the British Empire.

The *Manitoba Gazette* of February 8th contains a Proclamation, pursuant to the result of the voting under the Referendum held under the Manitoba Act, 8 Geo. V., c. 103, abolishing all property qualification for mayor, controllers, and aldermen of the city of Toronto.

LOCAL AND PERSONAL.

Mr. A. J. Gregory, K.C., of Fredericton, has been elected president of the New Brunswick Barristers' Society.

Mr. Roscoe S. Rodd, who has returned from overseas, has entered the firm of Rodd, Wigle and McHugh in Windsor, Ontario.

Mr. Howard Morwick, who has returned from overseas, has entered the firm of Langs and Binkley of Hamilton, Ont.

Mr. Titus J. Carter, K.C., of Andover, N.B., has been appointed solicitor for the Department of Works at Ottawa.

A Law-Students Association has been formed at Hamilton, Ontario, of which Mr. Walter Burns has been elected President, and Mr. Wm. McClemont, Secretary-Treasurer.

His Honour Judge Snider, of Hamilton, Ont., has been appointed Chairman of the Board of Conciliation which will investigate the dispute between the Grand River and Lake Erie and Northern Railways and their employees.

Mr. Joseph B. Walkem, K.C., has now completed fifty years of law practice in Kingston, Ont. This record, however, is surpassed by Mr. George A. Consitt, of Perth, Ont., who has been practising law for over sixty-eight years in that city.

Colonel Sanders, D.S.O., having served at the front with distinction, has resumed his duties as Police Magistrate at Calgary, Alta.

Captain C. Russel Widdifield, formerly of 93rd Battalion, C.E.F., has been appointed City Solicitor at Peterborough, Ontario.

Mr. D'Arcy Scott, of Ottawa, late of the Railway Commission, has returned to the practice of the law in that city.

We regret to have to record the following deaths:—[1]

D. W. Adam, of the firm of Adam and Mathieson, city-solicitor for Prince Albert, at Prince Albert, on January 3rd, in his 46th year.

Alexander Carpenter Beasley, of the firm of Beasley and Beasley, of Hamilton, at Hamilton, on December 29th, in his 59th year.

His Honour Judge Wm. McKay Reade, senior judge of Waterloo County, on January 26th, at Waterloo, Ont., in his 65th year.

James Holmes Macdonald, K.C., of the firm of Macdonald, Shepley, Donald, and Mason, of Toronto, on Tuesday, February 3rd, at Toronto, in his 74th year.

Duncombe E. Edwards, of Edmonton, Alta., on February 7th, at Edmonton, in his 69th year.

George R. McCord, D.S.O., of Sackville, N.B., at Sackville, in his 46th year.

George Murray, K.C., of Toronto, Ont., on February 2nd, at West Toronto, in his 91st year.

William Emmery Wilson, of Toronto, and formerly of Pembroke, on January 20th, at Toronto, in his 33rd year.

Alfred Girard, prothonotary of the Superior Court, of Montreal, on February 17th, at Montreal, in his 60th year.

Louis Gordon Glass, of Montreal, on February 17th, at Montreal, in his 52nd year.

[1] It is almost impossible to prevent occasional inaccuracies in the obituary column of the C. L. T. Corrections will be always gratefully received and duly recorded in our next issue.—Ed. C. L. T.

A. H. F. LEFROY

The
Canadian Law Times.

VOL. XXXIX. APRIL, 1919. No. 4

IN MEMORIAM

A. H. F. LEFROY, M.A., K.C.

LATE EDITOR OF
THE CANADIAN LAW TIMES

BY
PROFESSOR W. P. M. KENNEDY, M.A., LITT. D.,
DEPARTMENT OF MODERN HISTORY,
UNIVERSITY OF TORONTO

With the death of Augustus Henry Frazer Lefroy, M.A. (Oxford), Barrister-at-law (Inner Temple, London), K.C. (Osgoode Hall), Professor at the University of Toronto and Editor of *The Canadian Law Times*, legal circles in Canada have lost one of their most distinguished and best known members. Educated in England—at Rugby School and New College, Oxford—Lefroy was a man of fine and cultured parts. As a classical student, he gained many high honours at his University, and to the end of his life he enjoyed his classical authors. But his humanistic attainments were by no means narrowly classical. Widely read in modern history, in modern literature and in philosophy, he was a characteristic type of generous and wide learning, and, as a consequence, he seemed aloof from the modern world with its emphasis on material and commercial expansion.

Lefroy's training as a lawyer was carried out among the best English traditions in a law school which has gained everlasting fame as the true home of the English Common Law. When he joined the Inner Temple, London, he found his University gifts brought into contact with a life suitable to them and surrounded by traditions which are age long in English legal training. In the Inner Temple, he found legalism, dry-as-dust routine, galvanized into life by a philosophy of law, which looked behind the rounded case, the tabulated facts, the traditional forms, the organized statute to principles, to causes, to the human forces at work behind them all. This training left on Lefroy's legal outlook indelible marks. He remained all his life a student of law in the best and highest sense of the word—a legal philosopher, a legal historian. The closeness, the refinement of his learning might appear to the superficial acquaintance mere legal pedantry. Such an estimate would be quite unjust. They were the product of a generous and wholehearted love for his subject, which always rejected the easy method of the finished article, and despised the concentrated "short-cut" of the text-book. Lefroy hated text-books. His positions were arrived at by incessant workings out of materials for himself. He was a legal scientist.

In the University, this conception of his life's work was carried out with a chivalric devotion. Night after night he examined his lectures, and he never went into his lecture-room unprepared. Session after session he revised his lectures, and they were always level with the latest results of legal learning. Doubtless, many of his students found them too highly technical, perhaps overloaded with detail, perhaps somewhat intense in their wide scope and import, but his dread of the mediocre, of legal shallowness, of sophistry, of narrow and incomplete views fired him with a desire to place before his students, many of whom would become lawyers, the highest conception

of legal culture. His conscientious discharge of his University duties was the product not only of a high moral sense, but of a profound belief in the call to solidity in legal education.

In the world of legal learning and of legal letters, Lefroy secured an assured place. As Editor of *The Canadian Law Times*, he gained for it a recognized position among legal journals. During his *régime*, it is possible, as it were, to read from its pages all that I have already tried to express. His analyses and commentaries on legal decisions were the finest fruit of critical examination, of courage, of conviction and of scholarship. In addition, by bringing *The Canadian Law Times* into contact with the best known legal philosophers, and by securing for it articles from the best known legal writers of the day, he reflected his own conception of legal culture, which aimed at making it not only a practical, but an educative medium for legal thought. His ambition was to make it worthy of the best and highest traditions of British law.

As a writer of permanent works, Lefroy need fear no challenge. He gave the Canadian Constitution a secure position, wherever federal and comparative law are studied. His works on the Federal and Constitutional Law of Canada are standard, and he poured into them a legal knowledge which none of his predecessors and only a few of his contemporaries possessed. His place as an authority was recognized throughout the world, and he was constantly consulted by experts in England, Canada, Australia, and the United States in connection with the various problems arising out of federal constitutions. In addition, Lefroy was achieving a reputation in jurisprudence, and death interrupted a critical edition of Frederic Harrison's famous Lectures on Jurisprudence, which the latter specially selected him to prepare for the Oxford University Press. All Lefroy's legal writings are characterized by the outstanding qualities of his mind —profundity, philosophy, detail, width of vision in

scholarship, and a marvellous approximation to completeness.

As a personality, Lefroy was a man of distinct charm. Of courtly and dignified manners, he was an outstanding lesson and example to the modern world. To one and all he was uniformly correct and courteous. Preserving in a remarkable manner the freshness of youth, he could never in reality have grown old, and fewer memories of him will survive more fragrant than his buoyant happy vitality. Loving the gentle ways of humour, he despised the commonplace and the vulgar.

Going out amid the break up of a world which he knew so well, he never doubted the future. His outlook was that of disciplined, balanced liberalism. He had a profound respect for the English conception of law, for ordered freedom, for evolution, for growth, and he looked towards the building up of a newer world, based on the eternal principles of equity, justice and honour. His students have lost in him a man to whom their interests were an outstanding concern. The University has lost a distinguished professor. Messrs. Carswell & Co.—his publishers— have lost one of their most widely known writers, and the world of legal learning is the poorer to-day in a scholar of international reputation.

BY THE WAY.

The Terror of the Country Local.

The maintenance of professional etiquette amid the democratic surroundings of our towns and villages is a matter of compromise. The learned graduate in medicine (and future eminent specialist) consents to be called "Doc"; and the lawyer (with visions of himself as a corporation counsel) does not resent being simply plain "Pete" to the boys with whom he played football and sometimes "hookey."

But it is grinding on any man to become a victim of the friendly familiarity of the genial fellow who supplies the "locals" to the "Pumptown Times." Thus a staid young practitioner—saturated with the legal ethics that he was taught in the Law School—reads of himself a paragraph such as (with slight changes in proper names) the following:—

"Mr. P. Prior, solicitor from Hicksville, will be in town on Thursday, March 27th, and Friday, March 28th (Court day). Anyone having claims to present will make no mistake in consulting him."

Now it would never occur to the industrious gossip that in the same column has "alluded" to "Wm. Smith our popular tailor" and his trip to Toronto, and to Mr. Wesley Nearwet's coming operation for appendicitis that such a paragraph about another old friend could fill him with shuddering horror and cause him to hang his head when he enters the portals of the local Division Court. But it does! It hurts!

The Periodic Outcry for a "Government by Business Men."

Lawyers throughout the British Empire are not conscious of having done badly in service to the public

during the war. Not to mention outstanding instances such as General Smuts, the profession responded to the call with amazing alacrity and permeated all ranks and classes of war-workers. The Council of the Law Society in England are now considering a memorial to 569 solicitors and 341 articled clerks, in all 910, who gave their lives for their country.

But this of course does not check the eternal prejudice against a profession who are hatedly prominent in public life, prominent not so much because they have the necessary ability but because no other class of men will waste so many hours of their time in work that is paid only through the vanity of being prominent. It has always been so. Doubtless in the dark days of the Cataline conspiracy, Cicero heard the then ancient complaint "Cannot we have a government composed of sensible business men?" And when things looked squally in Gaul, men no doubt exclaimed "That is what comes of having a cheap lawyer like Cæsar muddling with things."

In England, some of the loudest and most influential of the press called so furiously for a "Government by business men" that they produced a tremendous upheaval, resulting in replacing an English barrister. Mr. Asquith, with a Welsh solicitor, Mr. Lloyd George.

Those of us who seek the *vox dei* in the *vox populi* may well consider if the instinct of the public is not correct in asking not so much the expressional qualities of the counsel as the practical sagacity of the solicitor, or as the Scotchman delights to call his lawyer, "my man of affairs."

It might be well if we should, in framing our syllabus of legal education, depart a little from the academic traditions of the past and launch our successful students into their professional life with perhaps less antiquarian lore and a better grasp of complex modern institutions. It may be necessary in some sort to be able correctly to define a "rent sec." But that form of dryness is hardly as pressing in daily practice

as a familiarity with the provisions of the Ontario Temperance Act. Advowsons and manorial tenures are quite interesting things; but very few people rush into our Canadian offices to ease their collars about these old-world troubles.

Some improvement has been made lately in the Law School at Osgoode Hall by giving a little elementary instruction in accounting and book-keeping. But for the most part the young lawyer has to make up his knowledge of practical things by pawing over the papers and facts that come before him. He learns how shares are issued, by furtively inspecting a stock certificate; and gets his insight into the procedure by Private Bills when he peeks into the Gazette.

It would save a lot of criticism of the profession if the early studies included the machinery of corporate finance and of municipal and departmental administration.

But withal the lawyer at the end of a quarter of a century of office practice *is a business man.* Perhaps his road thither has been strewn with a few casualties. But at that he is no such offender as the eye-specialist who when his big fee was objected to, exclaimed indignantly—"Why I spoiled eleven quarts of as good eyes as yours, before I learned to do that operation."

REPATRIATING LAW STUDENTS.

They have the same troubles in England that we have in Canada. The young soldier has to be passed through an annealing process before he can become the industrious apprentice in a civil pursuit. Thus "*Law Notes*" pleads for the returned students-at-law:

"Nearly all the April candidates are service or ex-service men, and no doubt the Examiners and Examination Committee will bear this fact in mind.

It is a strange change for them to sit down and read for a legal examination. The very words of a law book are to them almost a new language. Feed arm actuating studs are more familiar to them than distringases, company drill than company law, primary extraction than payment out of Court, counter attack than counterclaim."

"ARISING OUT OF AND IN COURSE OF EMPLOYMENT."[1]

Perhaps no expression made use of in compensation laws has been the subject of more consideration and discussion by administering boards and law courts than that which constitutes the subject of this paper.

People sometimes say that the modern compensation law provides for compensation in case of all work accidents regardless of the question of negligence, and that probably is the general conception of the law, but in 39 out of the 48 jurisdictions on this continent (*i.e.*, 40[2] in the United States and 8 in Canada) where a workman's compensation law is in force there is ingrafted upon the more general expression of the law the provision that an accident to entitle a workman to compensation must have happened in course of and must also have arisen out of his employment.

The eight jurisdictions whose laws do not include this expression are Ohio, Pennsylvania, Texas, Washington, West Virginia, Wisconsin, Wyoming, and the United States.

I will briefly state the expressions used in the laws of these States in lieu of the uniform wording of the other laws in this respect:

Ohio: "All injuries not self-inflicted received in course of employment."

Pennsylvania: "Injury by accident in course of employment."

Texas: "Personal injury sustained in course of employment."

Washington: "Personal injury whether received upon the premises or at the plant or in the course of employment while away from the establishment."

[1] Paper read by GEORGE A. KINGSTON, Commissioner Workmen's Compensation Board of Ontario, at the Fifth Annual Meeting of the International Association of Industrial Accident Boards and Commissions, at Madison, Wis.

[2] Including Alaska and the Federal Government.

West Virginia: "All personal injuries not the result of wilful misconduct or intoxication of employee or self-inflicted"

Wisconsin: "Personal injury while performing service growing out of and incidental to the employment, not intentionally self-inflicted."

Wyoming: "Personal injuries as a result of employment and not due to culpable negligence of injured employee or to the wilful act of a third person due to reasons personal to such employee or because of his employment."

United States: "Personal injury sustained while in the performance of duty."

It will be readily seen that in a number of cases this expression "Arising out of and in course of employment" substantially modifies the general principle that all work accidents are compensable regardless of negligence or fault on the part of the workman.

These may be conveniently enumerated under the following headings:

1. Street accidents.
2. Accidents while going to or from work.
3. Injuries due to scuffling, larking, or horseplay.
4. Accidents, as sometimes stated in legal textbooks, caused by the act of God or the country's enemies.
5. Injuries arising out of attempted robbery, fighting, assault, murder, or suicide.
6. Disabilities due to frostbite or heat stroke.
7. Accidents occurring during moments of leisure or while doing something of a personal nature or out of curiosity.
8. Camp accidents.
9. .[2] Accidents resulting in the aggravation of a pre-existing diseased condition, or extraordinary conditions amounting almost to accident resulting in disease, as *e.g.*, pneumonia resulting from exposure.
10.[2] Accidents due to disobedience of rules.
11.[2] Hernia, lumbago, and strain cases.

[2] Consideration of decisions under this head is not included in this paper.

One could go on almost indefinitely classifying occurrences which seem to fall outside the commonly accepted idea of "work accident," but the above list comprises the great bulk of cases presenting problems which administering boards and commissions are constantly confronted with, and it is the purpose of this paper to discuss some of the principles underlying the decisions in cases coming under these headings.

Street Accidents.—Prior to the decision of the House of Lords in the case of *Dennis* v. *White,* June 14th, 1917, there was a fairly well-settled line of decisions in England in regard to street accidents, to the effect, briefly stated, that if a workman is on the public highway on his master's business and becomes injured by accident due to ordinary street hazard, such an injury is not compensable, because it could not be said that the accident arose out of his employment, or in other words, as some of the judges expressed it, it was due to a risk no greater than is run by all members of the public.

One of the leading cases in which this principle of law was expounded was the famous banana skin case, *Sheldon* v. *Needham,* 7 B. W. C. C. 471, where an employer sent his servant to post a letter at a box a few yards along the street. While performing this duty, she slipped on a banana skin carelessly thrown on the sidewalk and broke her leg. For the reasons stated above it was ultimately held by the Court of Appeals that the employer was not liable.

The New York Supreme Court in the case of *Newman* v. *Newman* took the same view, and the idea seems to have been accepted in quite a number of the other States.

It was held in another English case, *Pierce* v. *Provident* (1911), 4 B. W. C. C. 242, that in order to make the employer liable in the case of street accidents employment in the streets must be practically continuous, as in the case of a canvasser or collector, the reason

for drawing the distinction being thus expressed by the master of the rolls:

As the work requires him to spend the greater part of the day on the streets he would be, in the course of his duties, beyond all doubt more exposed to the risks of the street than ordinary members of the public.

The Scottish Courts, however, held a different view. As one of the judges put it:

The risk of the road at the particular time was a risk incidental to the employment and it was none the less a risk of the employment because every pedestrian on the road at that time ran the same risk, or because the workman was facing this risk for the first or perhaps the only time.

Very early in the administration of the law in Ontario, *i.e.*, in 1915, the board was called upon to decide this identical question. A man employed by one of the cartage agents in Toronto was sent to a harness maker's shop some few blocks away to get a horse collar which had been left there for repairs, and on the way back he slipped on the sidewalk and broke his arm.

Our board, while entertaining the most profound respect for the decisions of the English Courts, is not bound to follow them, and the reasons as stated in the Sheldon case in regard to these street cases did not appear to us to be sound. We finally decided to adopt the view expressed by the Scottish Courts and allowed the claim.

It was, you may be sure, quite interesting to note that the House of Lords a couple of years later in the case first above referred to, *Dennis* v. *White*, 10 B. W. C. C. 280, discarded the theory or rule previously laid down by the English Court of Appeal as applying to this type of case and adopted the view expressed by the Scottish Courts.

The written judgment of Lord Chancellor Finlay in this case deals very fully with all the prior deci-

sions of importance on this subject and refers to the reasoning of these earlier decisions as unsound and antagonistic to the terms of the statute.

I have had the opportunity of reading the written opinion of the chairman of the Nova Scotia Board, Mr. V. J. Patton, in the matter of the claims arising out of the Halifax disaster of December last. The reasoning in the case of *Dennis* v. *White* was adopted, and it was held that claims in respect to killed or injured workmen in Halifax on that occasion should be taken as coming under the provisions of the Act, it being considered that the injury arose out of the employment because, by reason of the nearness of the city to the shipping in the harbour where high explosives were handled, all workmen in the city, whether engaged on the street, in the factory, or on the piers, were specially exposed to that particular danger.

Accidents While Going To or From Work.—Somewhat closely related to the problem of compensation for injuries in street accidents is that as to accidents happening while going to or from work. It is, I think, fairly generally held that after a workman leaves the employer's premises on quitting work or before he reaches the premises on going to work, he is not in the course of his employment, and an accident happening to him on the street during these periods could not be said to arise out of his employment.

The New York commission in one case went a step farther and rejected the claim of an office employee, who on finishing her day's work took some of her employer's letters to deposit in the post office and on the way was struck by a train. The reason stated for this decision is "that she was following the same route that she would have followed if she had been going home without undertaking to mail the letters and that she was exposed to no unusual hazard due to the employment." This sounds rather like the argument formerly given effect to in England prior to the decision of the House of Lords in *Dennis* v. *White* above

referred to. It seems to me such a case should turn on whether or not she was in the performance of her duties. If it was her duty to go to the post office on this message, then for the time being the hazard of the street was a hazard of her employment and her duties for her employer were not ended till she deposited the letters in the post office.

A number of cases have arisen where a workman is injured going to or from work by means of a conveyance provided by the employer. The question to be determined in all such cases is, Was it an express or implied term of the contract of service that the workman was to be so carried to or from his work? It seems to be well-settled law in England that if a workman is entitled either by express or implied contract to travel in a conveyance provided by the employer he is in the course of his employment, and an accident while so travelling would be held to have arisen out of the employment even though he is not on the employer's time till the place of actual work is reached. Both California and Massachusetts have held to this effect also in cases reported from those States.

We had one case in which we allowed the claim of a workman who was injured on the steps at the entrance of the building, part of which was occupied by the employer. We held that in renting a room or suite of rooms in a building the common entrance to the building should be considered in this connection as part of the employer's premises, and the hazard of the steps was a hazard peculiar to the employer's premises.

The Supreme Court of Massachusetts held to the same effect in a case which recently came before them,, *Re Sundine,* 105 N. E. 433.

The following are a few additional cases of this class which have come before the Ontario board:

Allowed—

Where the foreman of a teaming company, when quitting work in evening at sand pit, got on one of his

employer's wagons to ride into town, jumped off wagon at his street intersection, and was hurt by passing auto.

Where a workman employed by a railway at terminal yards about 4 miles outside the city was killed by train which he was about to board in the city to take him to his work. Usual custom for railway to carry men to their work at this point. Board considered case arose out of employment though workman's time did not actually start till arrival at work.

Where a man going to work in a lumber yard which adjoins railway tracks was killed by passing train as he was crossing the tracks to work. Considered he had reached the ambit of his employment.

Where a man on engineer's staff going into a lumber camp from town—pay started when he left town—broke through ice and drowned.

Where a car inspector who had evidently finished his day's work three-quarters of an hour before usual quitting time came into town as per usual custom by company's train. Evidently jumped off or jerked off near station, though no one saw accident. Body found alongside track.

Where a man employed by one of the tenants of a building entered the elevator in common use by all tenants of the building, and, instead of waiting for the operator, pulled the rope himself and was killed. Considered that the elevator was part of the premises rented and constituted one of the hazards of the business.

Where a man employed by a cartage agent was out plowing on a farm near town for a customer. On way home from work horses ran away.

Not allowed—

Where a man had been told the night before to go down to get work at an elevator in the morning. While on the way to work along railway track near the place where he was to be employed, about 9.30 or 10 a.m., he was hurt by train.

Where a man going from work in the woods instead of taking the company's bush road came out on railway track and was killed by train.

Where a railway workman on bridge work had been given a ticket home for Christmas holidays and return. On returning he jumped off the train at about the place where his work would be and was injured. This would have saved him a walk back from the station of about a mile.

Where a man working for a railway as section man, after quitting work in evening, jumped on passing freight to go down the yard to where he had hung his coat when starting work and was injured.

Where a man having met with certain injury the day before asked leave at 11 a.m. to go two or three blocks along street to an emergency hospital to get injury dressed. This took him across railway tracks. On returning, finding a train blocking the crossing, he attempted to climb through and got foot cut off.

Injuries Due to Scuffling, Larking, or Horseplay.— There have been a variety of opinions expressed on this type of case both in England and on this continent.

It was held in the recent case (1916) of *Parsons* v. *Somerset,* 9 B. W. C. C. 532, that where a railway porter in the course of his employment met with an accident due to his getting on the footboard of a car after the train started, not for any object of his employment but purely for his own pleasure (larking with two young ladies on the train), he was not entitled to compensation.

In another case, *Wrigley* v. *Nasmythe,* where a workman who went for some purpose to a fellow workman in the shop, on parting tapped his friend on the back with a rule, and received a push in return from which he was injured, it was held by the Court of Appeal that the accident did not arise out of the employment.

Our board in Ontario has adopted the rule in these cases that if the injured workman is an active partici-

pant in the scuffling or horseplay, he is not entitled to compensation, but if while going about his duties he is the victim of another's prank, to which he is not in the least a party, we do not deny him compensation.

I note the following cases from my records coming under this heading.

Allowed—

Where a Chinaman employed in a factory was the innocent victim of horseplay—blown up by hose.

Where a man who had been teased by another workman suddenly turned in revenge and hit an innocent party.

Where a man about to punch the time clock was hit from behind by another workman. Injured man innocent of any horseplay.

Where a man in line up for the time clock was pushed out of line by another workman, and to prevent himself from falling, as well as to save his place in the line, he grabbed the workman and his hand came in contact with a sharp knife in the latter's hand.

Not allowed—

Where, when a man splashed water over another workman, the latter in trying to avoid the water turned suddenly and, having hose in his hand, turned it on the man who first started the horseplay.

Injuries Arising Out of An Act of God or the Country's Enemies.—Under this heading about the only type of case in which the question has arisen is that due to lightning, but there have been a few cases reported during the last two or three years in England arising out of bombardments by enemy ships or airplanes.

In regard to lightning, the State boards or courts are not by any means uniform in their decisions and it can scarcely be said that there is in this country anything like a well-settled opinion.

The Supreme Court of Michigan recently held that a railway section man, who sought shelter from a

storm in an adjacent barn which was struck by lightning and who was injured, was not entitled to compensation, basing this decision on the argument that the risk was not different from the risk run by other members of the community.

The Supreme Court of Wisconsin also held that where a man working on a dam was killed by lightning, it was not a case for compensation.

The Supreme Court of Minnesota, however, took an opposite view and allowed compensation to a workman who was injured by lightning while seeking shelter under a tree at the time of a storm.

In those jurisdictions where only the first of the two conditions are required—that is, injury by accident during the course of employment, omitting "arising out of, etc"—there can of course be no question, as an injury by lightning is certainly an accident and if this injury takes place during the period of work the condition is complete. I should scarcely have thought that it could be argued, where a man goes into a building or under a tree to seek temporary shelter from a storm, that he has therefore left the employment, yet this point did arise in the Supreme Courts of both New York and Minnesota, and it was held that thus temporarily seeking shelter was not leaving the employment but rather incidental to it.

The decisions in England in lightning cases turn on the question of special risk. Thus, for example, a steeple jack repairing a flag pole is considered to be specially exposed to the danger of lightning; likewise, a man working on the top of a high scaffold was considered exposed to special danger and compensation was allowed. But where a roadman engaged in his ordinary occupation on the highway was struck by lightning, it was held that there was no special exposure to the danger of lightning and compensation was refused.

It amounts practically to this in England, that in all lightning cases the claimant must prove by positive evidence that the circumstances of the employment exposed the employee to a greater risk than that run by persons not so employed, or not so employed under the same conditions.

The bombardment cases in England turn on much the same point as the lightning cases, viz., the question of special risk or special exposure due to the employment.

In this connection dicta by Lord Chancellor Finlay in the *Dennis* v. *White* case above cited are of interest. He says:

"In the case of injury by bomb thrown from hostile aircraft, the fact that workman was engaged on work on a building brilliantly lighted so as to attract the notice of enemy crews might be most material as showing that the injury by the bomb was one which arises out of the employment."

It was actually held in one case (*Allcock* v. *Rogers*, W. N., December, 1917, p. 353), where a servant in a hotel whose duties were, among other things, to polish the brass name or sign plate on the outside of the building was injured by the explosion of a bomb dropped in the street a short distance away, that this did not arise out of the employment, or, in other words, that the workman was not exposed to any special risk incident to his employment.

In the famous Hartlepool case (*Cooper* v. *N. E. Ry. Co.*) the decision was similar. In that case an engineer, having left his engine to seek shelter while the bombardment was on, ventured back to open the injector in order to prevent damage to the fire box and upon returning again to shelter was injured by a bomb. In was held by the Court of Appeal that this injury did not arise out of his employment. As the Master of the Rolls expressed it:

"The claimant must prove that he was exposed by the nature of his employment to some special or peculiar risk beyond that of other inhabitants of Hartle-

pool. The whole town was within range of the guns and there was no evidence or suggestion that they were directed at any particular spot."

Injuries Due to Attempted Robbery, Fighting, Assault, Murder, or Suicide.—I suppose every administering board has occasion frequently to determine cases coming under this heading, and from all the reports I have been able to read it seems quite a generally accepted principle of law in every jurisdiction that where a workman in the discharge of his duty is assaulted either by another workman or by a stranger in attempted robbery of the employer's premises, compensation should be allowed.

A border-line case, however, arose in Massachusetts and compensation was denied. In this case a night watchman was shot by mistake by officers pursuing burglars who had committed robbery in the neighbourhood and were being pursued. There was no suggestion that robbery of the premises claimant was guarding was feared, and he was not fired upon because of his employment, but clearly through mistake. The Court held that the injury did not arise out of the employment.

The Supreme Court of New Jersey also refused compensation in the case of a delivery man and collector who was shot by an unknown person for an unknown cause while in the performance of his duties. There was no attempt at robbery, though claimant had money on his person and it was held that the shooting was not in any way connected with the employment.

We had a rather unusual case in Ontario about a year ago which is also close to the border line, but our board allowed the claim. A night watchman was found dead in the morning, sitting in a chair in the office of his employer, shot through the head, apparently by his own gun. There was nothing which would warrant the conclusion that it was a case of suicide, but on the contrary it seemed probable that

he had been engaged in cleaning the gun, though there was no positive evidence as to this. It was a case in which the board was obliged either to infer suicide or accidental discharge of the gun while cleaning it, and the latter inference seemed the proper one.

It is equally well settled, I think, that where the assault which results in the injury arises out of a dispute or quarrel purely personal to the workman and not associated with his employment, compensation should not be allowed.

The distinction may be thus illustrated: Where a foreman is assaulted and injured while trying to compel a discharged workman to leave the place of his former employment, I think that the claim should be allowed. This was an actual case in California. On the other hand, and this is a case from our own province, a street car conductor in resenting what he considered a personal insult directed at him by a soldier passenger abused the soldier rather badly. The latter, upon going to his camp nearby, reported the affair to his soldier companions, whereupon a number of them returned, boarded this conductor's car as it was returning and beat him up, causing severe personal injury. We held that this was a purely personal quarrel and that the injury thus sustained did not arise out of the employment.

In another case which came before us, two workmen got into a dispute over some material or tools required in connection with their work and, words finally leading to blows, one of them was quite seriously injured. This one appeared to be the least to blame of the two, yet he did actively participate in the scrap. We held that the dispute was a purely personal one between these two men, and as the interests of the employer were in no way involved or concerned the injuries could not be said to have arisen out of the employment.

We also rejected a claim in a case where a boy was found dead at his place of work with a loop of rope

around his neck, as the circumstances pointed to suicide rather than accident.

Injuries Due to Frostbite or Heat Stroke.—The cases coming under this heading turn upon the same consideration as the lightning and bombardment cases above noted, viz., the question of special exposure.

In the *Warner* v. *Couchman* case, decided by the House of Lords in England in 1911, a baker whose duty was to drive a bread delivery cart was frostbitten in the hand. The County Court Judge held that there was nothing in the employment which exposed him to more than the ordinary risk of cold to which every person working in the open air was exposed on that day, and consequently the injury did not arise out of the employment. The House of Lords held that the decision of the County Court Judge on this question of fact was final.

Important dicta by one of the Appeal Court judges, however, are quoted in the House of Lords with favour as expressing the point of view with which he says judges should approach cases of this kind:

"Where we deal with natural causes affecting a considerable area, such as severe weather, we are bound to consider whether the accident arose out of the employment or was merely a consequence of the severity of the weather to which persons in the locality, whether so employed or not, were equally exposed. If it is the latter, it does not arise out of the employment because the man is not specially affected by the severity of the weather by reason of his employment."

In the case of *Dennis* v. *White,* above referred to, which reversed the old line of decisions in regard to street accidents, Lord Chancellor Finlay, in referring to frostbite and sunstroke cases as distinguished from ordinary street accidents, says:

"In such cases it is material to show that the work involves special exposure to the heat or cold. Where

the risk is one shared by all men, whether in or out of the employment, in order to show that the accident arose out of the employment, it must be established that special exposure to it is involved."

In regard to heat stroke, there are two English authorities in which the principles governing these cases were fully considered — one in the House of Lords in 1908 (the *Ismay* v. *Williamson* case) and the other in the Court of Appeal in 1914 (*Maskery* v. *Lancashire*). These were both shipping cases. In the one a stoker was overcome with heat while trimming the fires and in the other a young man not in the best of health who had shipped as an engineer on a vessel bound for Singapore, while sailing in the southern port of the Red Sea, was overcome by heat and died.

In both cases the Court held that death was due to accident arising out of the employment, and it did not affect the situation to say that the man was not robust enough to stand the tropical heat. It was sufficient to find that the work in the engine room or boiler room exposed the workman to excessive heat, which was far greater than that to which ordinary sailors whose duty does not take them into the engine room were subjected.

We had a case of frostbite in Ontario last winter which the board allowed. A railway workman was sent out with an auxiliary crew to clear a wreck—weather thirty degrees below zero. He was put at the job of flagging and was so engaged three or four hours, with the result that his legs and feet were very badly frozen. Under these circumstances it was considered accidental injury arising out of the employment.

Accidents Occurring During Moments of Leisure or While Doing Something of a Personal Nature.— Cases coming under this heading are very numerous and their decision must necessarily turn on the particular circumstances in each case. In England, as

well as in all the jurisdictions on this side whose reports I have had the opportunity of reading, there is quite a latitude allowed workmen in respect to moments of leisure during the course of employment. The crew of a train, for example, waiting at a switch to make a crossing; a sailor in a river boat waiting for the tide; a machine operator waiting for material which he is dependent on another workman to bring to him; a trainman having a few hours between arrival at terminal and departure on return journey—one can easily imagine a variety of cases of this type, where the workman is clearly in the course of his employment but for the time being has no duties to perform for the employer.

To quote Milton: "They also serve who only stand and wait."

The question to be asked in every such case is, Did the workman occupy those moments of leisure reasonably, having regard to all the circumstances?

If during such an interval of waiting he meets with an accident while engaged in some occupation or amusement which is unconnected with his employment, or which adds to the risk to which he would otherwise be subject, judges in the main agree that compensation should not be allowed, but what one may reasonably do, of a personal nature and which is not in conflict with specific instructions, should not be held as taking a man outside the scope of his employment for purposes of compensation in the event of accident while so occupied.

The following decisions are noted in this connection: The New Jersey Supreme Court allowed a claim where a workman was killed while crossing railway tracks near the place of his employment to the toilet in common use by workmen in the employer's service. The Supreme Court of Massachusetts held that a compositor who went out on the roof on a hot night for fresh air and was injured by making a misstep was entitled to compensation. The California

commission went so far as to hold that a cook was entitled to compensation, where he left the kitchen to smoke for a time on the adjoining porch, and on attempting to return opened the wrong door and fell downstairs.

There is one decision, however, reported from Iowa, which I think is carrying the idea of personal liberty at the expense of the employer too far. In that case a workman was allowed compensation who undertook to light his pipe while his hands were moist with gasoline, with which he had been cleaning clothing.

We have had a variety of these personal and leisure-moment cases before our board, quite a number of them arising out of accidents occurring to workmen while remaining on the employer's premises during the luncheon hour.

I note among them the following:

Allowed—

Where a woman worker boiled water for tea on a gas jet near her work and it boiled over or was knocked over causing injury.

Where a boy, 14, working in a planing mill, being desirous of fixing up a small block of wood for his own use, took it to a saw to cut it to the desired shape and got his thumb cut off.

Where a scavenger, working for city, found two electric bulbs in garbage and out of curiosity cracked them together and lost an eye.

Where a section man, who had gone into city on his speeder to get his pay check, was found dead on the track, evidently run down by train on way home.

Where a workman being dusted off by another workman, by means of air hose, gets an internal charge and dies of peritonitis.

Where a workman paid 50 cents a week extra to engage in fire drill for the employers' voluntary fire department was injured while so drilling.

Where a boy employed on a vessel having some leisure time while the vessel is tied up at a certain wharf, in chasing a rat which appears on the wharf, trips into the water and is drowned.

Where a labourer engaged in certain building work went into the shop or tool house to take shelter from a storm, and while there undertook to sharpen a fellow workman's chisel. When done, went to turn off switch and was electrocuted.

Where a man on quitting work went to boiler for a pail of water with which to wash, slipped, and scalded himself.

Where a man in a mill having a moment of leisure went to another part of the plant to pay a small board bill to a fellow workman (and was injured).

Not allowed—

Where a man, seeing an adjoining machine idle and being curious to know how it works, attempted to operate it and got his thumb cut off.

Where a workman sleeping at noon hour on employer's premises, took a fit and rolled against a hot steam pipe.

Where a boy went out of his way to grind his jackknife on a machine where he had no business to be and was injured.

Where a man working on repairs on a ship, whose living quarters were on the ship, left his boat in the evening to spend the evening visiting his brother on another vessel alongside, owned by the same company, and was injured while leaving this other vessel late at night.

Where a workman taking a bath on employer's premises (a cordite factory) fell against some hot pipes. It was alleged that it was necessary to take a bath every day in this work to keep in condition. Considered personal business.

Where a workman brought a bottle of ginger ale as part of his lunch and in opening it the stopper flew up and hit him in the eye.

Where a young man, after eating his lunch on the premises, climbed out on the roof of the building and, finding himself slipping, grabbed a wire within his reach. This sagged his weight, and then he grabbed another, thus creating a circuit, and he was electrocuted.

Camp Accidents.—Owing to the extensive lumbering and mining operations carried on in our province, we are frequently called upon to deal with claims coming under this heading.

I refer especially to such as may happen to a workman after working hours. It is well understood, of course, that in most of these operations the men spend the whole of the twenty-four hours on what may be termed the employer's premises.

Practically the same principle is involved in this type of case as in the noon-hour accident cases above noted.

We allowed the claim of one man in a river driving camp who after supper went to his tent; while lying on his blanket on the floor reading another workman came in and accidentally stepped on claimant's hand, inflicting a wound which became septic, with quite serious results. We considered that the accident, properly speaking, arose out of the employment.

We allowed another claim where a workman in walking from the dining camp to the sleeping camp slipped on the ice and broke his leg; also another claim where a workman slipped on the steps of the cook house where large building operations were going on for an aviation camp.

In a border-line case, the claim was allowed where a workman was hired to go to work on a boat next morning. He actually came on board that night and slept on the boat, but was badly hurt next morning before his duties actually began.

On the other hand, where a workman was injured by slipping on an icy path leading from the works to

his own house, which was on employer's premises, claim was disallowed.

It follows, of course, that workmen injured on the employer's roads leading from the woods to the camp are considered in the course of their employment, and in a few cases claims have been allowed for accidental injuries under such circumstances.

The California Commission allowed a claim where a workman was injured by falling from a log on the road while coming with others into camp from the woods, but the decision seems to have been put on the ground in that case that these men were allowed time to return to camp from their place of work.

WOMEN AS PRACTITIONERS OF LAW.

Mr. Justice Riddell has collected the learning on this subject in a brochure reprinted from the Journal of Comparative Legislation and International Law. The net result of their admission is not quite startling.

"The whole number of women practising law in Canada is very small, perhaps a dozen in all, e.g., Alberta has called only one and she got married, Saskatchewan only two; the numbers may be expected to increase but not rapidly. I do not think that the most fervent advocate of women's rights could claim that the admission of women to the practise of law has had any appreciable effect on the Bar, the practise of law, the Bench or the people."

Perhaps the vigilance of the male lawyers has something to do with the failure of the ladies to create a revolution in the profession. For male barristers have pursued and married three out of the eight ladies on the books of the Law Society of Upper Canada.

JOHN HIGHET THOM.

AN APPRECIATION BY JOHN A. PATERSON, K.C.

It was in 1837 that John Highet Thom first saw the light of day. He was a son of the soil, and, like many others who were thus earth born, or *authochthones* (as the old Greeks expressed it) gave true and worthy service to his native land.

By the old fable of the giant Antaeus the ancients taught us that the strength came from the land, for when Hercules with his mighty strength flung the giant to the ground he rose again with redoubled vigour, and Hercules could only conquer by throttling him between earth and heaven. The ranks of our professional men in Canada, doctors, lawyers, engineers, preachers, architects and soldiers would be, indeed, thin and poor were it not for the stalwart contribution from the farm-houses of our country. These farms bear other harvests than those ordinarily recognized; these are harvests of heart and nerve and brain, which find their place in the strenthening and uplift of Canada among all ranks and conditions of men.

Having early ambition for a professional career the subject of this article was enrolled among the Upper Canada College boys in 1852, when F. W. Barron was principal (the father of Judge John A. Barron, of Stratford). He entered the University of Toronto in 1857 and graduated in 1861, with a medal for proficiency in mathematics in his hand. His mind stored with useful knowledge turned to the work of education, and he was lecturer at Morin College at Quebec. But afterwards, as many men of mathematical bent have done, he turned to the practice of law, and in 1875 was called to the bar and became a partner in the firm of Bethune, Osler & Moss, one of the leading firms at that time in Toronto, of which the Honourable Featherstone Osler, K.C., is the only sur-

viving member. In 1879 he was appointed Chief Taxing Officer at Osgoode Hall, and continued in that office up to a period within a few months of his death. In Bailey's "Festus" these lines are to be found—I quote them from memory:

> "Are there not two events in the history of a diver?
> The first when a beggar he prepares to plunge,
> The second when a prince he rises with his pearl."

Verily the Government of that day in 1879 found the best man, and put him in the right place. "Blessed be the man who hath found his work; let him ask no other blessedness."

This office demanded a good knowledge of the practice and principles of law, and he discharged its duties with more than general satisfaction. The dignity of his position, the care of litigants and courtesy towards the solicitors distinguished his office. Notwithstanding the wordy storms, and the clash of 'Yes and No,' his judicial mind clearly saw the end from the beginning, and he was popular even amongst those against whom it often became his duty to decide. John Thom, however, had other sides to his nature; in the rests between his work he was often ready to discuss a mathematical problem (although he never squared the circle), or a new book on theology, or the peculiar qualities of a variety of roses. He would thus unbend himself and so maintained the elasticity of his youth throughout his advancing years; he had indeed a vigorous old age, and the gulf stream of his youth found its way within the arctic regions of his later years. But, as Emerson puts it, we do not count a man's years until he has nothing else to count, and John Thom had much else to count. He was a great reader and retained what he read. His theology was of an advanced and advancing type, and his keen vision saw "far ben." In that respect he was like Burnbrae in the classic tale of Ian Maclaren. But he was more than a mathematician, a lawyer or a

theologian. He was not only an elder in old St. Andrew's Presbyterian Church, but what is of far more account, a fully orbed Christian. It grew late and dark with him on the morning of the 8th of March, and many regrets and kind reminiscences from many friends now follow him, for as "Guesses at Truth" has it, "A Christian is God Almighty's gentleman."

THE EFFECT OF BOLSHEVISM ON CONTRACTS.

An interesting case which turned on some of the peculiar territorial relations arising out of the war was the *Eastern Carrying Insurance Co.* v. *The National Benefit Assurance Co.*, decided a week or two ago by Mr. Justice Bailhache. The short point was whether a company domiciled in Petrograd could maintain an action in the English Courts, the defendants' contention being that the Government of Petrograd being Bolshevist, and the Bolshevists being in armed conflict in Russia with British forces, the action was in effect an action by an alien enemy. The learned judge decided in favour of the plaintiffs, mainly on the ground that Great Britain is not at war with Russia, but only with the Bolshevists, to whom the plaintiffs had not 'adhered.'—*Law Journal.*

EVERY-DAY LEGAL TOPICS.

We have been favored lately with a letter requesting us not to deal too much in questions of International and Roman Law, but rather such matters as concern the ordinary busy lawyer,—every-day topics, such as Assessments, Elections, Division Courts, Fences, Watercourses, etc. We are open to suggestions as to such topics and, by way of introduction, offer the following:

The Neighbour's Overhanging Apple Tree.

This is not a boundary tree such as is encouraged by R. S. O. 1914, ch. 213, and in which both adjoining owners have common property; but that wide-spreading tree planted in the neighbour's orchard and stretching its branches far over the fence laden with King of Tompkins or Golden Russets. What to do about it? It might amount to malicious injury to property to haggle off the branches, unless done carefully. But what of the fruit?

Ordinarily in Canada the small boy eliminates the danger of a legal complication by risking an intestinal one. But in England apples are precious and we observe from the Solicitors' Journal of March 8th that the rights of the neighbour became a matter sufficiently important for the Divisional Court (*Miles* v. *Brooker*, Times, 18th February), to state the law and consequences. In this case the defendant did not lop off the branches. He picked and sold the fruit and the plaintiff recovered damages in the County Court for wrongful conversion. At once arose the very interesting distinction: Is the "overhanging" an act of trespass or just a nuisance? If a trespass, the defendant has a counterclaim; if a nuisance he would have to shew real damage from the overhanging to maintain a counterclaim. The Court decided that it is a

nuisance. The remedy and its limits are worked out thus:

"The defendant lops off branches of the plaintiff's trees or picks his apples, having a perfect right to so abate a nuisance. But the branches when lopped and the apples when picked are severed from the realty and immediately become the personal property of the owner of the tree. He can ask for and recover them from the defendant in an action for trover—so the Court held. The owner of the ground, once he has abated the nuisance, can adopt one of two alternatives: he may return the subject matter of the nuisance to the tree owner and claim damages or he may impound it on his own premises. In the latter case he constitues himself bailee of it, just as does the impounder of cattle damage feasant. And where he thus makes himself a bailee for the owner, he becomes subject to every incident of the relationship of bailment so that if he appropriates the bailed article, he becomes guilty of conversion."

ALBERTA'S FIRST DIVORCE.

DECREE IS GRANTED PENDING PRIVY COUNCIL JUDGMENT.

The first divorce application in a Calgary Court was made on April 3rd, 1919. The applicant is Ethel Ingham, wife of Thomas Ingham, a locomotive engineer in the employ of the C. P. R. The action was unopposed. Mrs. Ingham was granted a divorce, *contingent upon the decision of the Privy Council* in respect to Alberta's right to grant divorces.

THE PRIVY COUNCIL AND GREEK CATHOLIC.

(EDITORIAL NOTE.—We have all read from time to time of the Ruthenians, and have judiciously postponed any—even perfunctory—interest in these people. There are a lot of matters of which we are content to be ignorant. But when we find the omniscient Privy Council sharing our ignorance concerning some 300,000 inhabitants of Canada, we think ignorance has gone far enough and therefore make no apology for publishing the following article.)

In 1908 the Judicial Committee of the Privy Council dealt with an appeal in a case of *Zacklinski* v. *Polushie* (1908 A. C. 65), which originated in the Courts of the North-West Territories. The decision turned on a pure question of fact and the circumstances of the case are not important. But in the course of their judgment, their Lordships make, obiter, certain incorrect statements which recent events have made it desirable to challenge. The headnote of the report reads as follows:—

> "In Galicia the population is divided between Poles and Little Russians, the former being Roman Catholic, the latter Orthodox Greeks who, as a condition of being allowed to use their own liturgy and conduct their services in the old Slavonic language, are compelled to acknowledge the supremacy of the Pope, all else being allowed to remain Greek. There results a composite church known as the Uniate Church, liable in Galicia to taxation by the Pope, in consequence of its enforced union with Rome."

In the judgment their Lordships say that "the Orthodox Greek religion is proscribed in Galicia" and that the term "Greek Catholic" is ambiguous. With most of these statements I desire to take issue.

1. It is not true that the "Little Russians of Galicia," who are also known as Ruthenians and Ukrainians, are "Orthodox Greeks." By "Orthodox Greeks," is of course meant members of the "Orthodox Eastern Church," commonly called the "Greek Church." The Ruthenians of Galicia all belong to the Uniate or United Greek Church, which acknowledges the Pope as its head and forms an integral portion of the (Roman) Catholic Church. This Uniate or United Greek Church (so called from its union with Rome), uses it is true the same liturgy as the Orthodox Church, but it is in belief, identical in all respects with the Catholic Church. Nor is this Uniate Church a new thing or an invention of the Austrian Government. It is of more than three hundred years standing. In 1595 the Ruthenian bishops of the whole Ukraine, then under Polish rule, voluntarily concluded a union with Rome, which was confirmed by the Ruthenian Synod of Brest in 1596. With two exceptions all of the bishops, including the Metropolitan of Kieff, the head of the Ruthenian Church, accepted the union. The exceptions were the bishops of Lemberg and Przemysl, and their successors did not adhere to the union until 1720. The Ruthenians, or

Little Russians, of Galicia have all, since the latter date, been in union with Rome.

2. It is not true that these people, or any of them, "as a condition of being allowed to use their own liturgy and conduct their services in the old Slavonic language, are compelled to acknowledge the supremacy of the Pope, all else being allowed to remain Greek."

No such bargain or arrangement was ever entered into or ever subsisted. The liturgy used by the Ruthenians, though almost identical with that used in the Orthodox Church, is and always has been one of the recognized and authorized liturgies of the Catholic Church. It was composed in the fifth century by Saint John Chrysostom, who is to this day honoured at Rome as one of the great saints and doctors of the Catholic Church. It has been from earliest times, and still is the authorized liturgy of a large section of the Pope's spiritual subjects in southern Italy. It was translated into the Slavonic language in the ninth century by Saints Cyril and Methodius, the apostles of the Slavs, and Old or Church Slavonic has ever since then been one of the languages authorized by the Catholic Church as a liturgical language. People unfamiliar with Eastern Christianity are apt to suppose that Latin is the only such language in use in the Catholic Church. There are in fact ten languages in which on every day in the year mass is said by priests owing allegiance to the Pope. These are: Latin, Greek, Coptic Geez (Abyssinia), Syriac, Armenian, Arabic, Church Slavonic and Rumanian.

3. It is not true that the Ruthenians of Galicia, or any of them, were compelled, conditionally or otherwise, to acknowledge the supremacy of the Pope. On the contrary, they stood precisely where their ancestors had stood ever since 1595, or at latest since 1720.

For generations there has been no compulsion in Galicia in matters of religion. The Orthodox religion was always tolerated there, whether under Polish or Austrian rule, back to the sixteenth century, when the Province first came under the domination of Poland. There has been complete religious freedom in all Austria-Hungary for all denominations ever since 1781. Successive editions of the Statesman's Year Book have for many years contained the following information as to religion in Austria.

"The leading principle is religious liberty and the independence of the Church as regards the State, saving the rights of the Sovereign arising from ecclesiastical dignity. The Minister for Ecclesiastical Affairs will grant legal recognition to any religious bodies if their doctrine, worship, constitution and designation contain nothing illegal or immoral. The Catholic Church has seven Latin Archbishoprics and one Greek Ruthenian and one Armenian Archbishopric, twenty-three Latin and two Greek Ruthenian bishoprics. The Greek Oriental or Orthodox Church has one archbishopric and two bishoprics. Protestants have six superintendents of the Augsburg Confession, three of the Helvetian and one of the Mixed."

And for Hungary, the following information has been given:—

"There is perfect equality between all legally recognized religions. These are: The Roman and Greek Catholic, the Evangelical (Augsburg and Helvetian), the Unitarian, the Greek Oriental, the Gregorian Armenian, the Baptist and the Jewish."

4. It is not true that the Orthodox Church was proscribed in Galicia, or anywhere in Austria-Hungary. On the contrary, it has been for the last half century, and possibly for a very much longer period, one of the state religions. The Orthodox Church is made up of seventeen independent churches or branches which are all (excepting the Bulgarian) in communion with each other and together form one religion or church under the titular primacy of the Patriarch of Constantinople. Of these seventeen churches no less than four existed in Austro-Hungary. They are:

1. The Church of Carlowitz for Serbs in Hungary.
2. The Church of Hermannstadt for Rumanians in Hungary.
3. The Church of Bukowina for all Orthodox in Austria.
4. The Church of Bosnia and Hercegovina made up chiefly of Serbs, but including all Orthodox in those provinces.

And not only were they permitted to exist, they were in fact established churches. The archbishops and bishops of all four of them were paid salaries by the state, and sat as *ex officio* members of the Upper House of Parliament at either Vienna or Buda-Pest, as the case was. The confusion in the judgment of their Lordships evidently arose from a failure to distinguish between the Orthodox Church itself and the Russian Church, which is one of its seventeen branches already alluded to. Prior to the revolution, the Russian Church was under the absolute domination of the Imperial Russian Government, and was constantly used by the State as an instrument of Russian nationalist propaganda. The Ruthenians or Ukrainians of Galicia are identical in race with the people of the Russian Ukraine and the Russian government was always scheming to secure the annexation of Eastern Galicia to Russia. Some years ago the plan was adopted of sending into the province political agents in the guise of missionaries of the Russian Church. The Austrian Government became alarmed and decreed the expulsion of these men. But if the Russsian Church was not available to the Ruthenians, the Orthodox Church of Bukowina was and the two churches are absolutely identical in doctrine, ritual and practices. The only difference between them was that one was governed by the Holy Russian Synod, practically a department of the Imperial Russian Government, while the other was under the Orthodox Archbishop of Cernowitz, an Austrian subject. And if a Uniate Greek Catholic wished to join the Church of Bukowina he was free to do so. Everyone in Austria or Hungary was permitted to change his religion as and when he pleased. All that was necessary was that he should register the change with a government official for statistical purposes. I am not of course concerned with a defence of the Austrian laws or constitution, which have now passed away. What I am concerned with is the correction of misstatements which may still create a wrong impression regarding the religious status of about a quarter of a million Canadian citizens.

The judgment of their Lordships seemed to assume that the Uniate Greek Catholics of Galicia were really Orthodox Greeks who were uniate under compulsion and that once in Canada, with the compulsion released, they would naturally revert to the Orthodox Church. Experience has shown the fallacy of this assumption. It is twenty-five years since the happening of the events which gave rise to the decision under review. There has so far been no movement of any importance among the Ruthenians making towards union with the Orthodox Church. There are now probably between two hundred and fifty and three hundred thousand Ruthenians resident in Canada. Of these probably between two hundred and two hundred and fifty thousand are members of the Ruthenian Greek Catholic Church. Of the remainder not more than half or say in all twenty-five thousand, about eight per cent., are persons who were formerly uniates but who abandoned the Roman for the Orthodox Communion, and these are as a rule more inclined to be independent than to attach themselves to the regular Orthodox Church. With these the impelling motive for the change appears to have been the fear of coming under the control of Latin bishops rather than any particular desire to be associated with the Orthodox Church. The other half of the non-uniates is made up of, (1) Immigrants from Bukowina and the Ukraine, who belonged to the Orthodox Church before coming to Canada, (2) Socialists who do not profess any religiou, and (3) members of one or other of the Protestant denominations.

5. It is not true that anyone in Austria-Hungary is or ever was liable to taxation by the Pope. It is difficult to conceive how such a fantastic statement could have come from such a source. As every educated person knows, the Pope has no longer any power to tax, even in Rome itself. He never had that power outside the Papal States, of which he was at one time the temporal sovereign. It is quite true that the members of his church all over the world make him an annual contribution known as "Peter's Pence." Donations to this fund are, however, purely voluntary. It is in no sense "taxation." The making of contributions is not enforced even under spiritual sanction. The rules of the church do not specify what amount must be donated nor even that the making of some contribution is compulsory.

6. It is not correct to describe the Uniate Greek Catholic Church as a "composite church."

What is evidently meant by a composite church is a church having the doctrine or belief of one church and the liturgy and language of another. But this, as has already been pointed out, is based on the erroneous assumption that the Greek or Byzantine liturgy and the Church Slavonic language are not indigenous in the Catholic Church, but are the exclusive property of the Orthodox Church. There are within the Catholic Church various divisions called "rites" or churches, and while these are all identical in belief, and in particular all unreservedly accept the Catholic doctrine regarding the Papacy, each has its own peculiar liturgy, liturgical language, canon low, ecclesiastical dress and local customs. There are, including the Latin, fifteen of these rites or churches. With few exceptions each of these is autonomous under its own patriarch

or other ecclesiastical head, who deals directly with the Papal authorities. No bishop or other ecclesiastic has in general any authority over those of a rite other than his own. And while the Latin rite is numericaly immensely the greatest, far outnumbering all the others put together, yet in the eyes of the Church all rites are of equal rank and authority, and no one is more peculiarly Catholic than any other. Nor is this situation in any sense a recent innovation. The idea of a church made up of different local churches with a common doctrine but differing in every other respect is as old as Christianity. Such was the Catholic Church for the ten centuries prior to the Great Schism, made up as it was of the local churches of Rome, Constantinople, Alexandria, Antioch and Jerusalem, the five Patriarchates, each following its own peculiar rite. And when the four Eastern Patriarchates separated from Rome she nevertheless still counted within her fold other similar, though numerically less important, local churches, and has continued to do so up to the present time.

Nor is the idea of many rites united in one Church or religion confined to the Catholic Church. The Monophysite Religion includes four distinctive rites or Churches, the Coptic, the Abyssinian, the Jacobite and the (Monophysite) Malabar, which are in entire communion and are identical in belief, but which in all other respects differ very widely one from another.

So little is generally known in the west of these eastern rites that anyone may well be pardoned for falling into the error complained of, but I think that in the light of what has been said it must be admitted that I have good ground for objecting to the correctness of the term "composite church" as applied to that portion of the Catholic Church known as the Ruthenian Greek Catholic Church.

7. There is no ambiguity about the term "Greek Catholic." On the contrary it has a very definite and well understood meaning. It is used exclusively to designate a member of a Uniate Church of the Byzantine or Greek Rite in communion with Rome. It is used in contradistinction with the term "Greek Orthodox," which designates a member of one of the churches which together form the Orthodox communion or religion. It is so used in standard works of reference. For instance in the Encyclopædia Britannica, the Encyclopædia Americana and the Catholic Encyclopædia, "Greek Catholic" is used in that sense and in no other. When the Orthodox Church (the only other "Greek" church) is meant it is called the "Orthodox Eastern Church," its more appropriate designation. Similar use is made of the term in "Whitaker's Almanac," in which religious statistics for Austria-Hungary are given under the heads of "Roman Catholic" (meaning Catholics of the Latin or Roman Rite), "Greek Catholic (meaning Byzantines who are in communion with Rome), and "Greek Orthodox" (meaning members of the Orthodox Eastern Church). The same terms are used with a like meaning in the Statesman's Year Book, excepting that for "Greek Orthodox" the term "Greek Oriental" is sometimes substituted.

As the result of a fairly exhaustive search through books of reference and other works I have not been able to find a single

instance of the use of the term "Greek Catholic" in any sense excepting as applied to a person in communion with Rome. The term is not often employed in other than Catholic books; but where it is used at all it is used exclusively in that sense.

This is, however, a matter which anyone may test for himself. We have in Canada a quarter of a million Ruthenian Greek Catholics who are in communion with Rome, ten thousand of them in Ontario. Ask one of these if he is a "Greek Catholic" and he will answer "yes." We have also a considerable number of members of the Orthodox Eastern Church, commonly called the "Greek Church." Ask one of these the same question and he will answer "no." Substitute for that question "Are you an Orthodox (pravoslavni is the word in Ruthenian), and the answers will in each case be reversed. (Of course care must be taken not to frame the question in the form "Are you Orthodox?" to which anyone might answer in the affirmative). An Orthodox may occasionally call himself an "Orthodox Greek Catholic," though that is unusual. But he will never call himself a "Greek Catholic" omitting the word "Orthodox." Dr. Adrian Fortescue gives the official name of the Orthodox Chuch as the "Orthodox Eastern Church." Rev. Professor Headlam in an article in the current Quarterly Review gives it as the "Holy Orthodox Eastern Church." No doubt the Orthodox Eastern Church, in common with most Christian Churches, claims to be "Catholic." According to the Encyclopædia Britannica its official designation is "The Holy Orthodox Catholic Apostolic Eastern Church." But as is there pointed out, "Orthodox" is the designation upon which particular stress is always laid. Moreover in practice the laity usually repudiate the term "Catholic." I had occasion sometime ago to prepare a deed of land in trust for an Orthodox church. The designation given me by the priest was "Bukowinan Orthodox Greek Catholic Church." But when the trustees saw this they insisted on striking out the word "Catholic." The inscription over the door of the church since erected on this property reads "Austrian Bukowinan Orthodox Greek Holy Trinity Church."

Light is thrown on the matter by examining the designations which Orthodox bodies have selected when seeking incorporation in Canada. I know of only five such incorporations, one by an Act of the Quebec Legislature and four by letters patent under the Alberta Companies Act. The first of these, incorporated by chapter 141 of the Quebec Statutes of 1909, is named:—

"Greek Orthodox Church Evangelismos of Montreal."

The four Alberta corporations are as follows:—

"Orthodox Greek Catholic Church, Siv. Woznesnia Hospoda Nasz. Is. Chrysta, Congregation of the Orthodox Greek-Catholic Church."

"Greek Orthodox Romani Biserica Inaltareal Sfinti Cruti of Shepentez, Alberta."

"Greek Orthodox Congregation Siviatoho Ilija, of Duvernay, Alberta."

"Orthodox Greek Oriental Church of Saints Peter and Paul, of Nowa Bukowina, Alberta."

The matter is now definitely settled in so far as the Ruthenians are concerned by chapter 191 of the Dominion Statutes of 1913, which incorporates their bishop as "The Ruthenian Greek Catholic Episcopal Corporation of Canada." This statute also makes very clear their subjection to the spiritual authority of the Pope. See in particular the preamble and sections 1 and 12.

The reason for the addition of the word "Ruthenian" to their name is that they are not the only Uniate body calling themsleves "Greek Catholics." There are in fact seven variants of the Byzantine Rite in communion with Rome who answer to that name. These are the Pure Greeks, the Italio-Greeks, the Uniate Georgians, the Melchites (Syrians), the Ruthenians, the Uniate Bulgarians, and the Uniate Rumanians. Of these, besides the Ruthenians, there are in Canada a considerable number of Melchites and Uniate Rumanians and possibly some of the others are represented here also. The matter is complicated by the fact that all of these Greek Catholics will say that they are "not Roman Catholics." This is because by "Roman Catholics" they understand persons of the *Roman* or Latin Rite, to which they, of course, do not belong. But *as they* admittedly belong to the religion of which the Pope is the *visible* head, they are unquestionably "Roman Catholics" in the *sense* in which that term is used in Canada.

I cannot close without saying something of the present situation with regard to the Canadian Ruthenians, or Ukrainians, as they prefer to call themselves. There are, as I have said, about three hundred thousand of them in Canada, and they are industrious, frugal and law abiding people and are therefore a valuable asset to the country. While the adults do not as a rule speak English, they are most anxious that their children should do so and the language question, if meddlesome interference does not prevent it, will therefore soon solve itself. His Lordship Bishop Budka, who counts about five-sixths of them as his flock, has been doing all in his power to make of them good Canadians and his efforts have been meeting with success. It is therefore, to say the least, unfortunate that, in despite of history and ethnology, they should have been branded by both the government and the public as "Austrians" and "alien enemies," and as such deprived of the franchise and otherwise discriminated against. There is moreover at the present moment in certain quarters a blind and unreasoning demand for their deportation, a proposal as unwise as it is impracticable. They are of course Austrians in the sense that when they left Galicia it was an Austrian province, but they are no more entitled to be called "Austrians" than are the Poles of Galicia, the Czeco-Slovacs or the Jugo-Slavs. They are not and have never been pro-German. They have always hated Austria, ever since by the partition of Poland they became her unwilling subjects, and they have been far more bitter in their opposition to the Austrian government than have the Poles themselves. It is a pity that these facts are not more generally known, and acted upon. There is no reason whatever why Canada should be saddled with a "Ukrainian Question," unless through ignorance and blind prejudice we create one and hand it on to our descendants.

W. L. Scott.

THE MAN WHO IS NOT THE CHAUFFEUR.

The *Central Law Journal* (St. Louis) of March 7th has a good article by Mr. C. P. Perry on "*Rights and Duties of Occupant of Automobile other than Driver.*" His conclusions are:

(a) *Not Chargeable with Negligence of Driver*—"It is the law in nearly all of the States that an occupant of an automobile who has no right of control over the driver and exercises no control of him is not chargeable with the negligence of such driver."

(b) *Members of the same Family.*—This fact does not affect the rule that the driver's negligence is not imputable to the occupant.

(c) *Machine under Control of Occupant.*—"If the occupant has the right of control over the operation of the automobile and permits it to be negligently driven he is chargeable with his negligent failure to exercise his right to require the driver to properly operate the car."

(d) *Care Required of Occupant.*—"It is no less his duty, when he has the opportunity, than it is of the driver to discover and avoid danger; and if he voluntarily goes into a patent danger that he could reasonably avoid he cannot recover for resulting injuries."

(e) *Intoxicated or Careless Driver.*—"It may be incumbent upon a passenger or guest in the exercise of ordinary care to refuse to ride with a driver who is intoxicated or who is known to be negligent or incompetent."

(f) *Liability of Operator to Guest.*—"The duty of the operator to the occupant (including a guest) is to exercise reasonable care not to unnecessarily expose

the occupant to danger and injury by increasing the hazard of that method of travel." "A person thus invited to ride stands in the same situation as a bare licensee who enters upon real property which the licensor is under no obligation to make safe or keep so, but who is liable only for active negligence." (*Patnode* v. *Foote*, 153 App. Div. N. Y. 494).

NEW BOOKS

A Short Treatise on Canadian Constitutional Law, by A. H. F. Lefroy. With an Historical Introduction by W. P. M. Kennedy, Department of Modern History, University of Toronto. Toronto: The Carswell Company, Limited; London: Sweet & Maxwell, Limited, 1918.

Professor Lefroy appropriately dedicates this admirable volume to his gallant son, Lieut. Frazer Keith Lefroy, who fell at Vimy Ridge.

The date of its completion, 1st July, 1918, shows that in the dark days of the first half of 1918 the author did not despair of the Commonwealth. According to Sir Douglas Haig's historic despatch "the situation was an anxious one," but "the definite collapse of the ambitious offence launched by the enemy on the 15th July, and the striking success of the allied counter offensive south of the Aisne, effected a complete change in the whole military situation."

And now, in the confident hope that the victory achieved by the Allies will be followed by a just peace, we may continue the study of Canadian Constitutional Law. It was a happy idea to secure an historical introduction by Professor W. P. M. Kennedy, as to which space will permit only one observation, namely, that in dealing with the interesting and instructive history of our Constitution, Professor Kennedy shows a truer sense of proportion than most writers on the subject.

In addition to an unusually full and accurate Table of Contents, Professor Lefroy has stated 27 "Leading General Propositions" which are useful in giving a preliminary view of the results of the more important decisions upon the British North America Act. These propositions are not claimed to give a complete view, but so far as they go are very carefully stated, and for the most part are founded on judgments of the Judicial Committee of the Privy Council.

After giving a brief account of the formation of the Dominion of Canada, Professor Lefroy states that his treatise "will be mainly concerned with the provisions and interpretations of the British North America Act, 1867, especially with those portions of it which distribute legislative power over the internal affairs of the Dominion between the Federal or Dominion Parliament, on the one hand, and the various provincial legislatures on the other." The book, however, contains an account of the paramount authority (in theory) of the Imperial Parliament and of the introduction of English law into Canada, and Professor Lefroy does well to state on page 40: "But it must always be remembered that those great constitutional documents which comprise almost the whole of the written portion of the Constitution of Great Britain —Magna Charta, the Petition of Right, the Bill of Rights, and the Act of Settlement—are equally included in Canada's Constitution, while as to the unwritten part of the Constitution, those legal decisions which embody the common law Constitution of Great Britain are equally authoritative in Canada, and we may say of both the Dominion and provincial governments that that great body of unwritten conventions, usages, and understandings which have in the course of time grown up in the practical working of the English Constitution and which are so admirably dealt with in Dicey's 'Law of the Constitution,' form as important a part of the political system of Canada as the fundamental law itself which governs the federation."

The sections dealing with the Crown in Canada are specially satisfactory, showing sound scholarship and careful research. Indeed, it may be said all sources of information as to the development of our Constitution have been studied by Professor Lefroy, so that his claim that he had the ideal throughout of completing his task "absolutely without regard to the trouble involved" has been fully substantiated.

Before dealing with specific legislative powers of the Dominions and provinces there is a discussion of the general principles of interpretation and the text concludes with some useful general remarks.

Then follow 118 pages of elaborate notes giving a vast amount of information and many references. The professional reader does not need to be warned that the quotations in these notes vary in authority, in fact many are from arguments of counsel which are not authoritative at all. There are many statements of judges made in the course of argument and not binding on any one. Edward Blake delivered many powerful arguments before the Judicial Committee of the Privy Council from which there are several quotations, but it must be borne in mind that it is only the final decision in each case that is binding. Moreover, judges often ask questions and even make statements, during the argument of cases, for the purpose of drawing out counsel. If read with this in view many of these quotations are interesting and useful. If read without bearing this in mind some of these quotations may be very misleading.

The index, while not very full, is accurate. Though I have tested many of the citations I found no mistake, but, on the contrary, a precision much to be commended in these days of haste and hurry. The book is well printed.

The review in the "Times' Literary Supplement" of Professor Kennedy's "Documents of the Canadian Constitution" contains the pregnant statement: "It will not be the fault of Canadians and lovers of Canada if the history of the Dominion is not better known than that of any other land and people. It is a most attractive and on the constitutional side—to use a term much in vogue to-day—essentially a pivotal history; for in Canada the modern self-governing Dominion has been evolved, and the stages in the evolution are most clearly marked and unmistakable."

This indeed is very true and, it may be said without hesitation, that every one dealing with the constitutional developments in England, with devolution in general and the Irish question in particular, can study Professor Lefroy's book with advantage.

Anyone who reads Professor Lefroy's book with discernment and weighs his judicious comments on its decisions, cannot fail to realize the immense value to Canada of the Judicial Committee of the Privy Council.

J. MURRAY CLARK.

Early Economic Effects of the European War Upon Canada, by Adam Shortt (formerly Commissioner of the Canadian Civil Service, now Chairman Board of Historical Publications, Canada). New York: Oxford University Press; 35 West 32nd St. Net. $1.00.

This thoughtful essay comprises a survey of our general trade, including "the underlying and conditional factors of production, including labour conditions and prices, transportation, exchange and finance national and corporate."

But this survey is preceded by an analysis of our pre-war prosperity and our amazing opulence during the period of war-contracts. He sets forth tersely our economic expansion during the decade terminating 1913 with its accompaniment of real estate speculation, "followed by a very pronounced reaction in realty values which continued during the latter part of 1913, and was still very marked when the war broke out in 1914," and a "double reaction in economic conditions." Then he describes how the war was precipitated before economic laws could operate; and the effect of voluntary recruiting: "One of the earliest and most important economic effects of the war was the relief of the congested condition of the labour market at the time of its outbreak." Also the prevention of the distress due to unemployment by assigned pay and separation allowances.

The war also produced an economic revolution due to the national borrowings and expenditure on the munition industry, all of which "resulted in a sharp transition from stagnation to feverish production."

And now we come to certain considerations which make his essay valuable to sanguine people—just as a cold plunge is good for a man with a good circulation.

"Practically none of this borrowing, manufacturing and price making which prevailed proceeded on the basis of ordinary economic investment, production and marketing." "No economic return was expected." "While the capital is being invested the stimulus to trade and industry is just as great from the enterprise doomed to failure as from one destined to success. So in the case of the expenditure on war."

And the Aftermath! "Up to the present Canada knows practically nothing of this unfortunate aftermath for even the interest on past war loans is being met from new loans or the excess profits tax which latter is only part of the exceptional capital expenditure due to war conditions."

"Since the Government itself has emancipated its operations from the conditions of all ordinary economic production and consumption, the unreflecting masses are apt to demand that it should do for the people at large what it has been able to do for itself. In a word there seems to be no valid reason why the Government should not forthwith abolish by Order-in-Council the old aphorism "*Ex nihilo nihil fit.*"

Keep this little essay handy, to lend to clients who want the Government to spend more money. But do not read it too hard yourself; it will make you blue around the gums.

THE GAZETTES.

The *Manitoba Gazette* of March 1st contains a Proclamation appointing "The Alien Investigation Board of Manitoba" to investigate persons of enemy alien birth and issue identification cards to those whose sympathies are shown to have been with the cause of the allies.

The *British Columbia Gazette* contains an Order-in-Council prohibiting the issue of probate or administration to any German, Austro-Hungarian, Turkish or Bulgarian subject without the express license of the Crown acting through the Minister of Finance.

The *Ontario Gazette,* March 15th, contains notice of the incorporation without share capital of two societies, viz., *Central Spiritual Society* and *Toronto Independent Church of Modern Spiritualism.* We have read somewhere of the corruptible putting on incorruption; and now conversely we have the incorporeal becoming corporate.

The *British Columbia Gazette,* March 27th, has the following:—

Now know ye that We do for that end publish this Our Royal Proclamation, and do hereby appoint Sunday, the thirteenth day of April A.D. 1919, to be observed throughout the Province of British Columbia as "Go-to-Sunday-School Day."

Other Gazettes please copy.

LOCAL AND PERSONAL.

Mr. E. T. Sirette, barrister and returned soldier, has been appointed Registrar of Land Titles at Neepawa.

Mr. J. F. Strickland, who saw considerable service in France, has resumed practice in Peterboro.

Mr. Louis Cote, of Messrs, Thompson, Burgess & Cote, Ottawa, has been appointed Crown Attorney for Russell County.

Lieut. A. F. Sample, of Regina, who enlisted as a gunner in the 60th Battery and was granted his commission on the field, will resume practice with P. M. Anderson, K.C.

Lt.-Col. W. B. Kingsmill, who organized and commanded in the field the 123rd Battalion, has resumed practice in Toronto with Messrs. Saunders, Torrance and Kingsmill.

Mr. Alexander Mackenzie, formerly of Messrs. Blake, Lash, Anglin and Cassels, has become Sir Alexander, being now a Knight of the British Empire.

The Calgary Bar Association recently held their first dinner since the beginning of the war. Among the guests were the C. J. of Alberta, Walsh, J., and Simmons, J. The proceedings were enlivened by a topical song satirizing the recently appointed Calgary K.C.'s.

OBITUARY.

The Hon. William John Hanna, K.C., M.P.P., formerly Provincial Secretary for Ontario and the first Food Controller for Canada, died suddenly at Partridge Inn, Augusta, Ga.

At the time of his decease he was President of the Imperial Oil Company, in which he had introduced a system of pensions and profit sharing. He will be best remembered for his humanitarian reforms in prison administration; being the first in Canada to introduce the "Farm" system.

Mr. Alex. G. Kemp, late of Messrs. Richards, Sweatman, Kemp and Fillmore, died on active service, having campaigned both at the Dardanelles and in France. He had a remarkably successful career as a student and solicitor in Scotland before he came to Canada, where he was admitted in 1907 to the Manitoba Bar.

Hon. Geo. W. Brown, second Lieutenant-Governor of Saskatchewan, died at Regina lately. He was born in Holstein, Ontario, in 1860; graduated at Toronto University, and was admitted to the bar of the North-West Territories in 1892. He was a member of the North-West Legislative Assembly from 1894 to 1905.

In the death on March 9th of Mr. E. A. Cohen, of Winnipeg the profession lost a member of unique attainments. Born in 1877 at Rangoon; graduate of Calcutta University; called to the Bar of Lincoln's Inn; practising in Winnipeg; Lecturer in the Manitoba Law School on Torts and Contracts. He devoted his leisure to public questions and his enthusiasm to the ideal of a Zion republic. On all matters of Hebrew scholarship he was a recognized authority.

RECENT SUPREME COURT DECISIONS.

THOMSON v. MERCHANTS BANK OF CANADA.

ALTA.] [MARCH 3RD, 1919.

Principal and agent—Trust money deposited by agent—Cheque sent to payee—Right of payee to fund.

C. bought from M. a parcel of land, the purchase price being payable in instalments, and transferred half of his interest to E. Later, E. sent to C. his accepted cheque for half of the amount of an instalment falling due, which cheque was deposited to the credit of C.'s account in the Bank of Montreal. Then C. drew a cheque of a same amount from the above account and sent it to M. with a statement that it was for his own share of the instalment. Payment of the cheque was refused by the Bank of Montreal on the ground that C. was in the hands of a receiver. M. brought an action asking that it be declared that the money standing to the credit of C. in the Bank of Montreal was the property of M., as being trust money in the possession of C. for the specific purpose of paying E.'s indebtedness to M.

Held, Davies, C.J., and Idington, J., dissenting, that the transaction was not impressed with a trust in favour of M.

Per Anglin and Brodeur, JJ.:—C. merely assumed, as agent of E., a personal liability towards M., whose right of action is one of damages against C. for breach of contract.

Per Anglin and Brodeur, JJ.:—The receipt of C.'s cheque by M. and its presentation, upon which it should have been accepted and paid, is not equivalent to a payment of the money itself to M.

Per Mignault, J.:—The money paid by E. being due by him to C. and not to M. was the property of C., and was not trust money in the possession of C. for a specific purpose.

Judgment of the Appellate Division [(1918) 1 W. W. R. 972] reversed, Davies, C.J., and Idington, J., dissenting.

MCCARTHY v. CITY OF REGINA.

SASK.] [MARCH 3RD, 1919.

Statute — Construction — Municipal corporation — Public work — Land not taken—Injuriously affected—Compensation—"Date at which damages are ascertained"—Sask. R. S. 1909, c. 84, s. 247.

Under section 247 of "The City Act" (Sask. R. S. 1909, c. 84), when any land, though not taken for some public work, is injuriously affected thereby, a claim for damages must be filed with the city clerk within fifteen days after the publication in a local newspaper of a notice of the completion of the work; and s.-s. 3 provides that "the date of publication of such notice shall be the date in respect of which the damages shall be ascertained."

Held, Davies, C.J., dissenting, that, in determining the compensation to be awarded under the statute, the court has only to consider the depreciation in value which the claimant's property, as it stood at the date of the publication of the notice, had suffered as a necessary result of the work done by the municipality.

Per Davies, C.J., dissenting:—Damages to buildings erected by the owner after the "work" has been commenced are not "necessarily incurred by the construction of the work," within the meaning of the statute.

Judgment of the Court of Appeal [1918, 2 W. W. R. 1913] reversed, Davies, C.J., dissenting.

Appeal allowed with costs.

GODSON v. BURNS.

B.C.] [FEB. 17TH, 1919.

Landlord and tenant—Lease—Conditional renewal—Mutual agreement—Liability of lessor—Trade fixtures—Removal by lease.

When a lease provides for a renewal thereof "upon such terms as may be mutually agreed upon," and further provides that "in the event of a renewal of this "lease not being granted, the lessor shall pay to the lessee . . . the actual costs . . . of alterations and additions" made by the lessee to the premises, the lessor is liable if no agreement is reached between him and the lessee, it being immaterial whether both, or either of them, were unreasonable in the discussion of terms and conditions of renewal.

It was also provided that "all improvements, alterations and fixtures constructed or made in and upon the said premises shall become the absolute property of the lessor" at the expiration of the lease.

Held, that the lessee was entitled to remove his trade fixtures.

Judgment of the Court of Appeal [(1918) 3 W. W. R. 587] affirmed.

Appeal dismissed with costs.

BANK OF HAMILTON v. HARTERY.

B.C.] [FEB. 17TH, 1919.

Debtor and creditor — Judgment—Mortgage—Registration—Priority —"Land Registry Act," R. S. B. C. (1911) c. 127, ss. 73, 104, 137 —"Execution Act," R. S. B. C. (1911), c. 79, s. 27.

A judgment, registered in the Land Registry office on an application made after the date of the execution of a mortgage by the judgment debtor but before the application for the registration of the mortgage, takes priority over the mortgage by virtue of section 73 of the "Land Registry Act." *Jellett* v. *Wilkie*, 26 Can. S. C. R. 282 and *Entwisle* v. *Lenz*, 14 B. C. Rep. 51; 9 W. L. R. 17, distinguished. Idington, J., dissenting.

Per Idington, J., dissenting:—The only charge a judgment creditor gets by virtue of his judgment is upon such interest as the debtor may have at the time of registration or issue of execution; and, in this case, that is subject to whatever rights the mortgagee may have acquired by virtue of its mortgage.

Judgment of the Court of Appeal [(1918) 3 W. W. R. 551] affirmed, Idington, J., dissenting.

Appeal dismissed with costs.

DUCHAINE v. MATAMAJAW SALMON CLUB.

QUE.] [FEB. 4TH, 1919.

Fishing right—Riparian owner—Personal servitude—Real right—Perpetual or temporary — "Profit à prendre" — Registration—Articles 405, 479, 2192 C. C.

Under Quebec law, the grant of a right to fish by a riparian owner confers no title to the river bed of the river in which this right is exercised. Such right is one of enjoyment only, essentially temporary in its nature and so does not endure beyond the life of the grantee. Idington and Cassels, JJ., dissenting.

Per Anglin, Brodeur and Mignault, JJ.:—The right to catch fish *in alieno solo* cannot be assimilated to the "*profit à prendre*," a term found in the common law of England but unknown to the civil law of France and Quebec.

Per Anglin and Mignault, JJ.:—The renewal of the registration of a right to fish after the official cadastre was put in force, was not required by article 2172 C. C. (*La Banque du Peuple* v. *Laporte*, [19 L. C. Jur. 66] followed, Brodeur, J., contra.

Appeal allowed with costs.

WEISS v. SILVERMAN.

QUE.] [FEB. 4TH, 1919.

Lien—Builder—Renunciation — Registration — Delay — Procedure —Transferee as mis-en-cause—Appeal—Absence of notice — Res judicata—Articles 1023, 1031, 1571, 2013b, 2081, 2127 C.C.—Article 1213 C.P.

S. supplied the materials and executed the work necessary for the plumbing and heating system included in the construction of a building. Within the delay during which he had a lien on the property without registration (articles 2013b C. C.), S. signed and delivered to B., with whom the owner of the property was negotiating a loan, a document by which he declared that he renounced *all legal privileges*. Later on, S. registered his claim against the property and afterwards transferred the greater part of it. W., a mortgage creditor, then took an action to set aside S.'s lien and, asking that the transfer be declared null and void, summoned G., the transferee, as mis-en-cause. In the trial Court G. appeared through counsel, but did not file any plea; and judgment was rendered dismissing the action, upon the contestation produced by S. W. then appealed to the Court of King's Bench and to the Supreme Court without giving any notice to G.

Held, that the privilege of S. had ceased to exist at the date of its registration.

Per Idington, J.:—S. having failed to enforce h's privilege within the delay mentioned in article 2013b C. C., his right was extinguished.

Per Anglin, Brodeur and Mignault, JJ.:—The document signed by S. was an absolute and unqualified renunciation of his privilege and not a mere undertaking not to register it.

Per Anglin, Brodeur and Mignault, JJ.:—On this appeal, S. cannot set up a plea of *res judicata* to which the transferee may be entitled.

Per Anglin, Brodeur and Mignault, JJ.:—The judgment of the trial court, so far as it affects the transferee, cannot be disturbed by the Supreme Court.

Per Brodeur and Mignault, JJ.:—W., though not a party to the document signed by S., has a right to take advantage of it, because as creditor of the owner who failed to do it, W. can exercise the latter's right to have the registration declared illegal.

Per Brodeur, J.:—A judgment pronouncing the extinction of a claim, if rendered before the notification of the transfer, can be opposed to the transferee.

Judgment of the Court of King's Bench, [24 R. L. n.s. 204] reversed.

Appeal allowed with costs.

DEVALL v. GORMAN.

ALTA.] [MARCH 3RD, 1919.

Contract—Deceit—Ingredients of—Finding of trial judge—Principal and agent—Total purchase price paid into bank—Right of agent to money.

A finding by the trial judge, that "the misrepresentations as to condition and capacity" of a log hauler "which induced" the plaintiff "to purchase were at least made with reckless carelessness as to their truth" is a finding of fraud sufficient to sustain an action of deceit; and such finding brings this case within the rule laid down in *Derry* v. *Peek* [14 A. C. 337]. Brodeur, J., dissenting.

G., agent for C., sold to D. a log-hauler for $750 more than the price fixed by C. D. deposited the total purchase-price in a bank to be paid to C., who disclaimed all right to the $750.

Held, that the $750 was the property of D., Brodeur, J., dissenting.

Judgment of the Appellate Division [13 Alta. L. R. 557; (1918) 3 W. W. R. 221] reversed, Brodeur, J., dissenting.

Appeal allowed with costs.

ALBERTA ROLLING MILLS v. CHRISTIE.

ALTA.] FEB. 4TH, 1919.

Company—Contract — Rescission — Shareholder — Subscription — Condition precedent or subsequent—Collateral agreement—Surrender of shares—Ultra vires of company.

C.'s action is for the rescission of an agreement to take shares of the capital stock of the appellant company and for the return of the purchase price on the ground of non-fulfilment of a term of his subscription. The sale of the shares was authorized by the directors, but no formal allotment was made to C.; no notice of allotment was given to him, but notice of meetings was sent. His name was not entered in the register of shareholders but appeared in a ledger account. Four months after full payment of shares,

certificates were issued and sent to C. during his absence, which were retained by him for two years. C. never attended any meeting of the company, but filled and sent proxies to the president and promoter of the company who had obtained his subscription.

Held, Idington, J., dissenting, that, under these circumstances, C. must be regarded as having become a *de facto* shareholder.

Held also that, even if the term alleged by C. had been precedent to his subscription, he would have waived it by becoming, and exercising rights of, a shareholder; but as, upon evidence, it was a condition subsequent or a collateral agreement, its fulfilment was *ultra vires* of the appellant company as involving an unlawful reduction of its capital.

Judgment of the Appellate Division (12 Alta. L. R. 445) reversed, Idington, J., dissenting.

Appeal allowed with costs.

LARSON v. BOYD.

SASK.] [MARCH 3RD, 1919.

Procedure—Evidence—Irrelevancy — Objection—Proper time—New trial.

When irrelevant evidence has been received by the trial judge, though subject to objection, a new trial must be had, because such evidence may have already influenced his opinion, if he has not disclaimed its having had any influence on his mind, Idington, J., dissenting.

Per Idington, J., dissenting:—Under the circumstances of this case, the failure by the respondent to object to the evidence promptly and at the proper time is fatal to any application for a new trial.

Judgment of the Court of Appeal [11 Sask. L. R. 325; (1918) 2 W. W. R. 1069] affirmed, Idington, J., dissenting.

C. P. R. v. HARTERY.

SASK.] [MARCH 3RD, 1919.

Railway — Liability — Injury to passenger — Negligence — Moving train—Jumping off—Under guidance of brakesman.

An experienced traveller proceeding by railway and wishing to alight at a place where the train did not stop takes all the risks of alighting there, even when a brakesman promised to slow up and tell him when to jump, which he did.

Appeal allowed with costs.

ADOLPH LUMBER CO. v. MEADOW CREEK LUMBER CO.

B.C.] [MARCH 3RD, 1919.

Contract—Construction—Ambiguity—Cancellation — Acquiescence.

M., respondent, contracted to supply lumber to A., appellant, and to make "shipping regularly." Owing to slow shipments, A. wrote cancelling the contract. M. merely acknowledged receipt of the

letter; but its manager, later on during a visit to A.'s mill, made no protest, according to evidence accepted by the trial judge.

Held, Idington, J., dissenting, that the cancellation of the contract by A. was accepted by M.

Judgment of the Court of Appeal (25 B. C. Rep. 298) reversed. Idington, J., dissenting.

Appeal allowed with costs.

DOMINION CHAIN CO. v. MCKINNON CHAIN CO.

EX.C.] [FEB. 4TH, 1919.

Patent—New invention — Manufacture in Canada — Importation of parts.

An application for a patent on "New and useful improvements in Grip Treads for Pneumatic Tires" contained fourteen claims respecting what the applicant desired to patent. In an action for infringement a disclaimer was filed as to nine of the fourteen claims, the plaintiff relying on the one feature of placing at right angles, instead of diagonally as in other grip treads patented, the chains connecting the sides of the grip treads when placed around the circumference of the tire.

Held, Mignault, J., dissenting, that giving effect to the disclaimer the remaining claims shewed that the invention was intended to consist of the entire grip tread and not of the right angled feature only; that all the elements of this invention were old and well known, and it had been anticipated by prior patents and prior user; and that the patent was properly declared void.

All the points of the plaintiffs' grip tread were imported, the only work done in Canada being to put them together by a simple operation that could be performed by any person.

Held, Mignault, J., dissenting, that this was importation of the invention forbidden by sec. 38 of the Patent Act, and the work done in Canada was not the manufacture required by that section.

Per Mignault, J.:—Placing the cross chains at right angles was a combination, previously unknown, of old elements and as such was a patentable invention.

Judgment of the Exchequer Court [17 Ex. C. R. 255] affirmed.

Appeal dismissed with costs.

C. P. RY. CO. v. DEPT. OF P. W. OF ONT.

RY. BD.] [FEB. 4TH, 1919.

Statute—Construction — Adproximun antecedens fiat relatio—59 V. c. 11 (Ont.)—Railway crossing—Maintenance—Seniority.

An order in Council passed by the Government of Canada in 1866 for survey of lands on the northerly shore of Lakes Huron and Superior and to provide for roads while the district was unorganized, directed that "an allowance of five per cent. of the acreage

be reserved for roads . . . also reserving the right of the Crown to lay out roads when necessary." By the Ontario Act, 59 Vict. c. 11, the Government was authorized to transfer to the Dominion of Canada, by order in council, certain lands occupied by the Canadian Pac. Ry., and in 1901 the lands were so transferred and afterwards granted to the railway company subject to the condition in sec. 2 of the above Act, namely, that the order in council should not be deemed "to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof" on said lands. In 1917 the Board of Railway Commissioners made an order allowing the Ontario Government to carry a highway across the railway on a part of said lands, finding as a fact that there were no highways in the district prior to 1901, and ordered a crossing to be constructed and maintained at the expense of the company. On appeal from this latter part of the order:

Held, Brodeur and Mignault, JJ., dissenting, that in view of the finding that there were no highways in the district when the railway company acquired title, the condition in sec. 2 of the Act must be construed as meaning "the rights of the public existing at the date hereof in common and public highways," and as including rights in highways to be laid out under the reservation for roads by the order in council of 1866. In the case before the Court, the highway existed before the crossing and the company was properly charged with the expense.

Appeal dismissed with costs.

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PARLIAMENTARY DIVORCE IN CANADA.

BY BRAM THOMPSON, M.A., BARRISTER-AT-LAW.

Is Parliamentary Divorce in Canada Legal?

This question was mooted rather than discussed in an article published in the CANADIAN LAW TIMES for October, 1917, which aimed at getting legal cognizance of the fact—a fact ignored or denied by the legal fraternity for thirty years—that the western prairie provinces were by Dominion enactment invested with the English Law of Divorce.

The controversy that ensued eliminated this mooted point and centred upon the other contention which two Courts of Appeal—that of Manitoba and that of Alberta—have since endorsed and affirmed. For final endorsement it is now before the Privy Council.

The achievement was looked upon as a powerful lever to force the Dominion Parliament to pass a general law of divorce for the Dominion; and thus not only to adjust the anomalous position of Ontario and the East, but also to abolish the Parliamentary system which at best is an anachronism. But nothing has been done in the way of rectification or reform; and as petitions for Parliamentary licenses to re-marry are in ever-increasing volume crowding the Parliamentary arena, I feel impelled to test the legality of

what is euphoniously called "Parliamentary Divorce" with a little application of law and logic.

Parliamentary Divorce in England was abolished in 1857.

The Dominion of Canada was Confederated in 1867.

Parliamentary Divorce is divisible into:

(*a*) Procedure precedent to the Act.

(*b*) The Act dissolving the marriage.

I.

System of Procedure.

The procedure in Canada is said to resemble the system which prevailed in England after the Reformation. Canada often acts wisely in adopting English rules; but it is not justified in adopting ancient institutions; and what it has pretended to adopt in the way of divorce procedure is a system discarded by England in 1857. How came this simulacrum, or effigy of a dead form, to be foisted upon Canada instead of the judicial system of divorce which the Imperial Parliament had established in England ten years before the same Parliament confederated the Dominion of Canada?

Neither system of divorce procedure was, however, conferred upon the Dominion of Canada. The Dominion, unlike its constituent parts, was invested with no law at the time of its creation; and it possesses neither law nor system of procedure except what its Parliament enacts. It has enacted neither a Divorce Law nor a Divorce Procedure; and certainly the Senate, even with the acquiescence of the House of Commons, could not usurp or invest itself with either law or procedure.

The Senatorial system is utterly void of either authority or foundation.

But this is not all. The abolished English and existing Canadian systems are so completely divergent in their essentials that they do not touch one another at a single point.

After the Reformation and down to 1857, there were two Courts in England for administering Divorce Law.

1. The Ecclesiastical Court.
2. The King and his Aula Regis—The House of Lords.

These Courts were supplementary of one another.

The Ecclesiastical Court was not what its name imports, a merely Church Court. It was a civil tribunal; but its limits of jurisdiction were fixed by church boundaries—the diocesan areas. Hence its name. The law which it administered was the Common Law of England—civil as well as criminal, and the Court was a Court of Common Law.

It was inevitable, however, that a Court administering Divorce Law in a country which has passed through the religious evolution of England, should be tinctured with ecclesiasticism. This engendered compunctions. They were hereditary compunctions from times long anterior to the Reformation; and so the Ecclesiastical Court failed to dispense the full Common Law of England, and stopped at granting a partial divorce—a divorce *a mensa et thoro*.

This severed the marital relationship, but it left intact the bond which precluded re-marriage. In some cases this sufficed; but when a full dissolution of the marriage was required, a further tribunal became necessary.

Before the Reformation this other tribunal was the Aula Romana from which the Pope, claiming to be head of the Church and Vicegerent of Christ, with his consistory of Rome dispensed absolutely with the obligations of the marriage bond.

After the Reformation the King became head on earth of the Church of England, and being also the

fountain of justice, he with his Aula Regis—the House of Lords—constituted the Court which exercised the power once reposed in the Pope, and his Aula Romana, of dissolving marriages.

Suits in this second Court were by way of petition to the King; and the petition could neither be made nor filed till first the decree of divorce *a mensa et thoro* had been granted by the Ecclesiastical Court and till the petitioner had obtained a verdict and judgment for damages in a separate action against the paramour.

This decree, verdict and judgment had to be filed with the petition to the King, and they were an essential and indispensable part of the record. In this way the King and House of Lords not only had, but they insisted upon having, before them the previous findings of two competent Courts upon the precise offences which were essential to the petition for a divorce *a vinculo matrimonii.*

Even this was not conclusive; for each petition was referred to a committee of the House of Lords who re-investigated and scrutinized the facts and previous evidence on record to see there was no collusion, nor anything to deprive the petitioner of the right which he sought.

When the committee marked the petition *fiat justitia,* a Bill was introduced and passed through the House of Lords, dissolving the marriage and declaring the right to re-marry. This was the divorce *a vinculo matrimonii.* But this, be it noted, was a decree and a right supplementary to, and dependent upon, the divorce *a mensa et thoro* previously given by the Ecclesiastical Court.

Now what is there in this that corresponds with the Canadian system? Absolutely nothing.

There is no previous trial of the crucial facts.

There is no previous partial divorce by a competent Court.

The Senate in Canada, which pretends to take the place of the House of Lords in the abolished English

system, has none of the functions of the House of Lords.

The House of Lords was, and still is, the oldest judicature in the King's realm. It is a Court of Justice. It has, besides its appellate authority, jurisdiction exclusively its own. It has the supreme judicial function in the United Kingdom; and it is pre-eminently the King's Court; and it was the most competent and fitting of all Courts to adjudicate upon petitions for complete divorce presented to the King, and to dispense that part of the Common Law which the Ecclesiastical Court withheld and for the obtaining of which there was no other forum.

The Senate, on the other hand, is merely a part of the Parliament of Canada. It has no existence and no power except as a constituent of the legislative machine. It is not a Court of law, and it has no judicial function; and yet it assumes such a function and not merely in a secondary sense, as did the House of Lords, but originally and *ab initio*, absolutely and finally, it decides on the crucial facts and the controverted allegations of divorce petitions. It assumes the judicial function, therefore, of both the old Ecclesiastical Court and of the House of Lords.

All that the B. N. A. Act gave to the Senate was a name and a niche in the Parliamentary shelf-board of Canada. The Parliament of Canada has wisely refrained from giving it more; and where then did it get the absolute judicial powers which it exercises in divorce suits except by arrant usurpation?

As a judiciary the Senate is a burlesque. Its finding on the facts is a farce.

II.

The Act of Parliament dissolving a marriage presents two considerations:

(*a*) The power of Parliament.

(*b*) The nature of the thing enacted.

The Parliament of Canada, in passing a Divorce Act, assumes to possess an authority identical with that of the Imperial Parliament. First let me say, that the power of the Imperial Parliament and the power of the King, in regard to divorce in England, were abrogated in 1857, ten years before Canada was confederated.

But more important by far is this, that there is no similarity—nothing in common—between either the two Parliaments, or the nature of their enactments.

The Imperial Parliament is absolute.

The Parliament of Canada is limited. It is limited, in the first place, not by the power of the Imperial Parliament, but by the authority of the House of Commons of the United Kingdom. This is a vastly different thing.

The King's own sovereignty as a constituent of the Parliament of Canada is itself limited by the B. N. A. Act.

It was not the House of Commons, but the House of Lords that controlled the English Divorce Acts. The King enacted them, but except a passive assent the House of Commons neither had, nor claimed to have, any control over them. It could not have initiated them, for these Acts were in verity and fact, part of a judicial process in relation to legal rights exclusively within the sovereignty of the King. They were the embodiment of and the only available method, except a Royal proclamation, of giving effect to the King's judgment upon the civil right of a subject presented to him on petition and referred by him to his *Aula Regis*—the House of Lords—for judicial determination.

These Acts, I say, were the King's judgment, and they dispensed to individuals the existent Common Law of England. They were not the exercise of an autocratic Sovereign power; for it was not till after the King acceded to the headship of the Church, and the English nation became dissevered from the Ecclesi-

astical Monarchy of Rome, that he became the Chief Justiciary, and prime dispenser of this branch of English Common Law.

In Canada, there is no Divorce Law for the Dominion Parliament to dispense; and what then do the Acts embody? The majority vote of a political assembly!

In the next place, the Parliament of Canada was created by the B. N. A. Act, and though it is absolute within its own domain, yet like every other statutory creation it is restricted in its sphere, and confined to the exercise of the functions and powers with which it is invested. It has nothing inherent, traditional, or historic, nothing in the nature of the Common Law privileges, prerogatives and powers which appertain to the Parliament or to the House of Lords, or the House of Commons of the United Kingdom. Everything it does must be within the orbit of its statutory functions and powers.

Its functions are legislative. Its sole power is to "make laws for the peace, order and good government of Canada" in relation to the matters prescribed, one of which is "marriage and divorce."

It is necessary here to repeat that the Dominion has no initial law. Neither the Common Law of England nor any other law was conferred upon it. It has no transmitted Divorce Law, and it has enacted none for itself. It has no Divorce Law to dispense as had the King and Parliament of the United Kingdom.

Is it then, when it passes an Act dissolving a marriage "making a Law of Divorce for the peace, order and good government of Canada?"

Let us see what law is; and what making law means.

Law, according to the best of all authorities, is a "Rule of civil conduct prescribed by the supreme power in the State commanding what is right and prohibiting what is wrong."

To make such a "rule of civil conduct" is the sole legislative function of our Parliament. A "rule of

conduct" involves something of general application—a regulation fixed for personal conduct, in future and possibly recurrent conditions. It is not an order, direction, or mandate, or even a license to re-marry given to a particular person or individual in circumstances which have already occurred.

A law or rule of conduct does not take cognizance of the individual. When the law or rule is made the individual has not appeared, nor have the conditions arisen in which it is to control his conduct. It is a rule "prescribed"—written anteriorly, and it is directed to conditions and conduct which transpire posteriorly. It is when those conditions and that conduct do transpire that the rule applies to the individual, and the sanction of the law finds a personal operation.

Moreover the rule of civil conduct which the Parliament of Canada is authorized to prescribe for "marriage and divorce" must be one "for the peace, order and good government of Canada."

An Act to confiscate the goods of A for past conduct, not previously prohibited or punishable, is not a law. It is a tyrannic sentence.

An Act to dissolve the marriage of A for acts hitherto immune from the law of the country, is not a law. It is not making a law; it is not a rule prescribed; and it does not establish any "rule of conduct" in future. It is purely an autocratic and tyrannic order.

The Parliament of Canada has no authority to make such an order even by statutory enactment. Such an Act would be *ultra vires*.

Such are all the Divorce Acts which the Parliament of Canada has been passing through the years since 1867. These Acts could not be valid unless Parliament had previously invested itself with authority—an autocratic authority—to make and pass such Acts. It has not done so. It has passed no Divorce Law; and in the absence of a Divorce Law, and of any authority to issue autocratic decrees, I make no hesitation

in saying every Divorce Act hitherto passed by the Dominion Parliament is *nullitas nullitatum* — absolutely null and void; and every husband and wife separated by such Acts is still truly united unless death has severed their bond.

But the children born to such people in second wedlock, what are they? Illegitimate. *Horresco referens!!*

III.

Conclusion.

What a monstrous simulacrum this system is and how it has fallen to pieces! No reality—no life—nothing to hold it together!

The Senate as a judiciary without basis or prototype—a veritable Star Chamber, and a blatant imposture.

A Parliament which, though limited and circumscribed, persistently violates its constitution and asserts an absolute power—a power which claims to absorb within itself the judicial functions of the Civil Court, and the right to issue autocratic orders, for which it has not even the pretence of law. A tyrannic Parliament in a vital affair of civil right!

Could autocratic inanity carry any Legislature farther?

Parliament probably in what it has done has been placating a certain ecclesiasticism which aims at again weaving into the constitution the theory that marriage is a divine institution, whose ceremonial merely takes place on earth, but the *vinculum matrimonii* itself is made in Heaven. Parliament itself rejects this superstition. Were this not so, why make its Senate a Court of Error for readjusting contracts made in the Kingdom of Heaven where, I think, its jurisdiction does not extend—for the present at least.

We are bound by the constitutional principles of the Reformation, and one of these is that marriage is

a civil obligation controlled by the law of the land. Canada cannot avoid or reverse this constitutional fact by enacting *no law*, for rectifying the wrongs of violated marriage contracts.

Marriage in Canada is effected by virtue of provincial enactments; and if any Legislature has the power of breaking or dissolving a civil contract without a specific law, it is the legislature by whose authority the contract is made.

The only derogation from this right is that the Dominion Parliament is given the power to pass a Divorce Law "for the peace, order and good government of Canada."

Until, and unless, the Dominion Parliament exerts this power and passes a law, the right of the Province is a *lex integra*. And the Provinces which were colonies before 1867 have all their laws as they were at the date of Confederation, including any Divorce Law that may have been conferred upon them at the date of their Colonial Constitution, and all subsequent emendations of it. The Provinces of Alberta, Saskatchewan and Manitoba have, by Dominion enactment, the Laws of England as of the 15th day of July, 1870.

All Provinces under the B. N. A. Act have full jurisdiction over their own Courts. Why not make these Courts administer the Law of Divorce instead of abandoning the right and allowing the Dominion Parliament to perpetuate the grotesque farce of dissolving marriages by autocratic orders while pusillanimously halting at passing a law in accordance with its statutory authority?

Nothing can displace or impair the undoubted authority of the Province over a matter of civil right, such as a marriage contract assuredly is, except a Dominion enactment on the Law of Divorce in conformity with the B. N. A. Act. Only such a law could give the Dominion Parliament or the Senate any jurisdiction or power whatever.

This fact makes it appear as if the Provinces were equally culpable with the Dominion Parliament in the establishment of the present system. Confounded, they were—possibly terrified and confused—by the wrangles of old Upper and Lower Canada; and then driven into acquiescence by the power, which so far has lain dormant, conferred on the Dominion Parliament of enacting a Law of Divorce by the Confederation Act.

The great desideratum, however, now is that the Dominion Parliament should, without further halt or fear, exercise its power and pass a general Law of Divorce for the Dominion of Canada, leaving each Provincial Supreme Court to administer it in the best interest of the people; for however much we may repine at or deplore the fact, divorces are one of the concomitants of civilization, and they seem to multiply as we progress. On the causes of this, it is not within my scope here to conjecture.

The fact remains; the evil is rampant; there is no longer excuse for the Parliament of Canada to be stagnant.

BRAM THOMPSON.

Regina, April, 1919.

BY THE WAY.

Divorce.

For many years in this country we have complacently patted ourselves on our sleek waist-bands and felicitated ourselves that we were not as certain Americans in the matter of a certain laxity of divorce laws. Meanwhile divorce in Canada has been a rich man's luxury; while poor men and women have been tied for life to faithless and disgusting mates, or if enterprising enough have drifted to the States and been lost to Canada.

Now it appears from Mr. Bram Thompson's article, published in this issue, that these de luxe divorces, while practically effective, are not theoretically unassailable. Is it not time that the Parliament of Canada passed a uniform law for all Canada—similar to the sensible law of England—which, while not weakening one iota the grounds for divorce, could be inexpensively administered by the Provincial Courts, and thus abolish one of those foolish, and (in this year of grace and social unrest), perilous distinctions between the Proletariat and Bourgeoisie? Incidentally the Act might confirm previous Bills that have been passed as private Acts, and enjoyed as public scandals.

County Judges.

We print Mr. Gorman's interpretation of the recent legislation with respect to County Judges, without concerning ourselves as to the exact technical correctness of his views. We feel that when he speaks of "a radical piece of legislation which may result in some counties being eventually deprived of a resident Judge," he has touched upon a tendency dangerous to the Upper Canadian social structure.

We recently read an article in Harper's Monthly on the "Chemist of the Future," wherein the author distinguishes between the technical expert, who is after all a mere laboratory worker with mechanical limitations, and the real chemist, who is a man of broader culture and thought. The same is true of all professions. There are lawyers and lawyers, Judges and!

The County Judge or his substitute under the various economic expedients mentioned in Mr. Gorman's article may decide cases more in accord with *corpus juris* than the older type of County Judge to whom we looked up in our boyhood days. But he lacks something if the boys (*aetat* 7 to 70) shall have ceased to look up.

We have done a lot in the last quarter of a century to pull the county life of this province into the industrial centres, and now rather late are beginning to try to control a quicksand into which we have joyously entered. Those who realize that the stability of our institutions depends ultimately on county society will find no personality more suitable to rally round than the staid, sedate figure of the old-time County Judge.

THE BRITISH NORTH AMERICA ACT—AGREEMENT OR GRANT?

For many years Canada has called herself a nation. In the field of politics she has steadfastly insisted upon the right, subject only to the control of the British Parliament, and in practice, if not in theory, subject to that control only when Imperial interests are gravely affected, to govern or misgovern herself as she pleases. This means that subject only to such limitations, and acting either through the Dominion or through the provinces (sections 91 and 92 of the B. N. A. Act, deciding which), she claims a right of control over all persons and all property that her arm can reach; and that as regards her legislation, however it may affect indirectly persons beyond her borders, she acknowledges no limitations other than those to which all self-governing countries are subject.

It may serve a useful purpose to note how far this political claim is being helped, or hindered, by our Courts of final appeal, and the justification for their action.

No English Court would think of holding that a law enacted by the British Parliament is unconstitutional. In like manner if Canada's claim to complete self-government, subject to the limitations above expressed, be well founded, all Courts would necessarily decide that any given legislation, not repugnant to some statute of the British Parliament, passed by the Dominion Parliament, must be *intra vires* unless it has to do with the subject-matter for provincial legislation; and similarly that any given legislation passed by a Provincial Legislature, must be *intra vires* unless it have to do with subject-matter or Dominion legislation. The fact that such legislation might be unenforceable because the arm of the Dominion or of the province was short, would not justify a declaration that it was unconstitutional.

The question then remains: "Is Canada such a nation, or almost nation"? and that question must be answered by reference to Canada's constitution. This raises another question, "What is Canada's constitution? Where is it to be found?"

In Mr. Lefroy's book, "Canadian Constitutional Law," p. xli., it is said: "The B. N. A. Act 1867 is the sole charter by which the rights claimed by the Dominion and the provinces respectively can be determined," and similar statements are constantly met with elsewhere.

These statements enunciate the doctrine that the rights of both Dominion and provinces are derived solely from a grant made to them by the B. N. A. Act, and they imply that the words of this Act contain an enumeration of all the powers granted by the British Parliament.

Case after case can be cited in which the reasons given for judgment are in strict accordance with this doctrine, most of them having to do with limitations on provincial powers.

The latest of these is the recent case of *Smith et al.* v. *The Provincial Treasurer of Nova Scotia,* decided by the Supreme Court, a case involving the *situs* of incorporeal movable property for succession duty purposes.

The Province of Nova Scotia asserted a right to impose succession duty on shares of the Royal Bank of Canada, belonging to the estate of a domiciled Nova Scotian, and registered on the Halifax register of the Bank, whose head office is in Montreal. The claim was maintained, some of the Judges holding that the local registration gave a *situs* in Halifax, but the majority basing their decision on the doctrine "*mobilia sequuntur personam.*"

The judgment turns principally upon the interpretation to be given to the Nova Scotia statute, but in some of the reasons are to be found an interpretation of the B. N. A. Act as a limited grant.

The Chief Justice is reported as referring to a finding of the Privy Council in a Queensland case, and saying:—

"This finding of the Judicial Committee no doubt was reached because the powers of the legislature in that colony were plenary and not limited, and they could, if they chose to do so, displace the domicile rule.

"But I am of opinion that the powers granted to the provinces of Canada under the 92nd section of the B. N. A. Act 1867, are not plenary but limited.

"Among the legislative powers granted to them under section 92 of the said Act, is sub-section 2, 'direct taxation within the province for the raising of revenue for provincial purposes.' The taxation imposed therefore must be on property 'within the province,' and what is personal property 'within the province' must be determined by the rule so firmly established in Great Britain with respect to it at the time of the passing of the B. N. A. Act as that embodied in the maxim '*mobilia sequuntur personam*' under which all the decedent's personal property wheresoever situate is brought within the province or country of his domicile and made liable for all succession or legacy duties there imposed upon it."

He goes on to declare his concurrence in the conclusion and reasons of Mr. Justice Anglin's judgment. He refers to those reasons as declaring that in sucession duties

"the domicile of the decedent and not the physical or artificial situs of the property must prevail. That this was the law in England decided in a series of cases before the B. N. A. Act was passed, and that the power of taxation within the province granted to the provinces in sub-section 2 of section 92 of that Act must be construed in accordance with the English law as it then was decided to be."

. . . . . .

"That while the Imperial legislature itself, or a colony possessing plenary powers of taxation could at any time overrule the principle embodied in the maxim (See *Harding v. Commissioner of Stamps for Queensland*, above quoted), the several provinces of Canada being limited in their powers cannot do so, or by any enactment of their own enlarge or extend the powers of taxation granted to them by section 92 of the B. N. A. Act."

. . . . . .

Mr. Justice Anglin is reported as stating one of the questions before the Court to be whether the taxation in question is "within the legislative powers of the province under section 92-2 of the B. N. A. Act—

is it 'direct taxation within the province in order to the raising of revenue for provincial purposes,' " the statement seeming to imply what the Chief Justice frankly affirmed, viz., that the sole source of provincial power to legislate is section 92 of the B. N. A. Act, and that the provinces have only such legislative powers as can be brought within the wording of that section construed as a grant. This view is confirmed by the last paragraph of his reasons, which is too long for quotation here.

The same view is expressly affirmed in a Privy Council case: *Woodruff* v. *Atty.-General of Ontario,* 78 L. J. P. C. 10 (1908), a case relating to property physically situated in New York.

Lord Collins, p. 13: "The pith of the matter appears to be that the powers of the provincial legislatures being strictly limited to 'direct taxation within the province' (British North America Act, sec. 92, subsec. 2), any attempt to levy a tax on property locally outside the province is beyond their competence. Directly or indirectly the contention of the Attorney-General involves the very thing which the legislature has forbidden to the province, taxation of property not within the province."

So in the case of the *Royal Bank of Canada* v. *Rex,* 82 L. J. P. C. 33 (1913). The Privy Council says: "The statute was on this ground beyond the powers of the legislature of Alberta inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province nor directed solely to matters of a purely local or private nature within it" In other words, section 92 of the B. N. A. Act was looked to as determining the power of the province, although it was not contended that the Dominion Parliament had the right to pass such legislation.

Again in *Rex* v. *Lovitt,* 81 L. J. P. C. 144, a case which involved no conflict with the Dominion, an argu-

ment based on this view of the B. N. A. Act is treated as a perfectly proper one.

The cases cited above are illustrations of limitations that have been declared to exist on the powers of the provinces, but it must not be forgotten that they involve limitations upon Canada as a whole because they deal with matters which if dealt with by Canada as a self-governing country, must be dealt with by the provinces.

It may be true that such insistence on the words "in the province" necessarily imply acceptance of the theory that the limitation on provincial legislation is greater than that on Dominion legislation, and therefore in that respect the judgments are not in harmony with other decisions of the Privy Council, but none the less they are inconsistent with the political claim to the right of self-government, and tend to establish a contrary doctrine.

Are they not based on a fallacy? The fallacy, viz., that the B. N. A. Act is a charter complete in itself granted by the British Parliament to the Dominion and the provinces, and therefore that section 92 limits or controls the relations of the provincial legislatures to each other and to foreign countries.

Should we not rather reason this way? The old provinces existed long prior to the B. N. A. Act, they created the Dominion out of themselves, making themselves for certain purposes, parts of a greater whole, but for others retaining their complete individuality and autonomy, the Act being merely the necessary sanction given by the British Parliament to their agreement, and a provision of the necessary machinery. The Act should, therefore, be construed as an agreement made between equals, *i.e.*, between the provinces and the newly created Dominion, and not as a charter with limitations granted by a superior to inferiors, to wit, by Great Britain to the Dominion and the provinces. What the provinces did, so far as legislation is concerned, was to surrender to their creation,

made of their own body and blood, all of the powers they formerly possessed save certain which they reserved for themselves, the reservations being alike in the case of each province. But whatever powers they did not surrender to the Dominion they kept to themselves, and kept unimpaired, and no province abandoned in favour of any other province, still less in favour of any foreign country, any right or power which it formerly possessed.

Sections 91 and 92 do not purport to define what Canada or the provinces may do, or may not do, as a charter granted to a newly created corporation would define its powers; their purpose is not to create new powers or to restrict old ones; their sole function is to distribute between the Dominion and the provinces powers possessed prior to Confederation by the several provinces, and assumed to be known, and in no need of definition. The very first words of the Act shew that its object is to carry into effect the desire of the constituent provinces, which is the historical fact.

Take as an example the Nova Scotia case cited. Prior to Confederation Nova Scotia may or may not have had power to tax a resident with respect to his property situate in Ontario or in New York. It may or may not have had power to tax movable property within its reach in Nova Scotia belonging to a resident of Ontario or of New York, but any powers which it then possessed, and which were not surrendered to the Dominion by the B. N. A. Act, these it may still exercise. Before 1867 had succession duty Acts been in force, Courts might have had to decide such questions, but they would have had to make their decisions without the help of the B. N. A. Act.

The point is that if it be admitted that the levying of succession duties, whether nominally on persons or on property, be not a matter surrendered to the Dominion (and none of the cases makes any such claim), then those same questions should still be answered

without reference to sections 91 and 92 of the B. N. A. Act, the simple reason being that the sections have to do with relations between the Dominion and the provinces, and with nothing else. If they do not give the power to levy succession duties to the Dominion of Canada, then the provinces still possess that power, and possess it in no way curtailed.[1]

Criticism such as is offered here is no doubt idle if the words of sections 91 and 92 accurately express limitations existing prior to Confederation. But do they?

The Act of 1840 uniting Ontario and Quebec, reads as follows: "Within the Province of Canada Her Majesty shall have power by and with the advice and consent of the said Legislative Council and Assembly to make laws for the peace, welfare and good government of the Province of Canada," not repugnant to any Act of the British Parliament. What does this mean, if not that, subject to the reserved veto, all powers of enacting legislation affecting persons and property in the Province of Canada then possessed by the British Parliament were surrendered to the newly created Legislature, to be thereafter exercised in Quebec instead of in England, save only in so far as the British Parliament might see fit to interfere by statute?

In this connection it would be well to bear in mind the words of Lord Watson in the Liquidators' case (1892), 61 L. J. P. C. 77: "In so far as regards those

[1] It may be suggested that the words "in the Province," "Provincial," in the various sub-sections of 92 were inserted for the purpose of protecting the provinces against encroachment by one on the other, but it would be going a long way to draw such an inference when regard is had to the title "Distribution of Legislative Powers," and to the way in which the words quoted are used.

A reasonable interpretation of the words "taxation within the province," might be "taxation" (be it directed against persons or against property) "operative" ("or that can be made effective") "within the province;" to treat them as simply emphasising the idea that the direct taxation reserved to a province is that which it has power to enforce within its own borders, but that direct taxation affecting the country as a whole remains with the Dominion; as indicating that no restriction was intended on 91-3, save with regard to matters of a purely provincial interest.

matters which by section 92 are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act."

If then it be true (and no other view is consistent with Canada's claim to be a self-governing nation), that the wording of section 92 has no bearing on the powers of the provinces, except when a conflicting claim is made on behalf of the Dominion, is it not time to recognize that in testing the right of a province to pass a law, some such questions as the following should be asked:—

1. Has the power claimed been surrendered to the Dominion?

2. Is the legislation repugnant to any statute of the British Parliament?

3. Is it a law for the peace, welfare, and good government of the province?

And that if the first be answered in the negative, further reference to section 92 is wholly irrelevant.

If within their several spheres the powers of Parliament and the powers of the legislatures are exactly similar in extent, it would seem to follow as a logical sequence that the test for the provinces should be exactly the same as the test for the Dominion.

As might be expected, the cases in which effort has been made to limit the powers of Parliament in matters admittedly not within the jurisdiction of the legislatures are much fewer in number (this may be because in section 91 there are no such words to rely upon as the words "in the province" of section 92), and consequently if any limitation is to be declared some other reason must be found.

Attempts have been made, but so far no decisions have been rendered which would make it necessary to transfer the fight for the fullest recognition of Canada's status from the Courts to the British Parliament.

In *Atty.-General of Canada* v. *Cain*, 75 L. J. P. C. 81 (1906), in which the Privy Council said, quoting from an earlier case, that a Colonial Legislature has within the limits prescribed by the statute which created it "authority as plenary and as ample as the Imperial Parliament in the plenitude of its power possessed and could bestow," the right of Parliament to pass legislation open to the charge of being extra-territorial, though not repugnant to any British statute, was seriously questioned, and similar objection was raised in the *Bigamy Case*, 27 S. C. R. 461. In both cases the legislation was upheld, but not on the broad ground that inasmuch as Great Britain had conceded to Canada full power to govern herslf, the Court was limited to deciding whether the proper body to exercise that power was the Dominion Parliament or the Provincial Legislature. It is true that the reasons of Mr. Justice Gwynne, p. 479, go the whole way, but in the *Cain Case* (p. 82, reference to *McLeod* v. *Atty.-Genl. of New South Wales*), and in the *Bonanza Co. Case* (1916), 26 D. L. R., p. 284, expressions are used inconsistent with the stand taken by him.

If the powers possessed by the Dominion are powers surrendered by the provinces then, so far at least as Ontario and Quebec are concerned, they are the powers possessed by Ontario and Quebec granted, not by the B. N. A. Act, but by the Union Act, namely, to "make laws for the peace, welfare and good government of the province."

The judgments in the cases referred to may be right or wrong, but it is clear in the provincial cases that the judges who rendered them were largely, if not chiefly, influenced in their decisions by the view that even where no claim of the Dominion is involved, section 92 sets limits to the powers of the provinces.

If it be true as here contended that the definition of the powers possessed by the provinces prior to Confederation is to be found in the Act of 1840, and not in the Act of 1867; and if it be also true that the later

Act is, as regards provincial powers of legislation, much narrower in its terms, then enough has been said to shew that reference to the B. N. A. Act, save only when conflicting claim is made for the Dominion, is a dangerous practice, and should be discredited. Such reference not only denies to the provinces rights they never gave up, it also tends to forge a chain restricting Canada's freedom of action as a nation, for, to repeat what has already been said, it must not be forgotten that many things which Canada, as a self-governing country should have power to do, can be done only through the Provincial Legislatures.

Canadians who subscribe to the views set forth in the opening paragraph of this article should see to it that a power which Canada has successfully claimed in the political field is not defeated by judicial pronouncements, and should require our Governments consistently and continuously to oppose all attempts of Courts to set limits to Canada's power to enact, and within her own borders enforce as best she can, such legislation as seems good to her, and should on every possible occasion strive for the upholding of the position taken by Mr. Justice Gwynne in the *Bigamy Case.*

To sum up, it is submitted:—

That the B. N. A. Act is in substance and reality not a concession by Great Britain to Canada, but the sanction of an agreement by which the provinces surrendered to the Dominion some of the powers previously possessed by them, and that the powers surrendered were not lessened in the transfer, and from those not surrendered nothing was taken away.

That so far at least as Ontario and Quebec are concerned the powers they possessed were powers "to make laws for the peace, welfare and good government" of these provinces not repugnant to British statutory enactments.

That the meaning and intent of these words was to grant power in all respects similar to that possessed

by the British Parliament itself, and control of the exercise by Canada of the power so granted her is vested, not in the Courts, but in the British Government through the reserved right of veto, and in the British Parliament through the exercise of its supreme authority.

That therefore no Court should take upon itself to declare that any provincial enactment is beyond the power of the legislature that passed it, unless it is also prepared to say that the right to legislate on the subject-matter has been surrendered to the Dominion, or is in conflict with some statute of the British Parliament; and similarly with any Dominion enactment.

That any and every attempt by the Courts to set limits to Canada's power to legislate through its Parliament or legislatures, save on the ground of repugnancy to some British statute, should be protested against and resisted to the utmost.

If the result be that the claim of full self-government is recognized by the Courts, the end desired will be attained; if the claim be denied the way will be clear to demand a change in the Act. But to reiterate on the platform and in the press that the right is possessed, and at the same time, without protest, to permit the Courts to restrict its exercise, is to check progress, and may mean retrogression.

A FALCONER.

THE GROTIUS LEGEND.

"If a book which is meant for contemporaries and deals with present day affairs, opens with a historical disquisition carrying us back a couple of centuries, the reader is apt to be suspicious." Thus begins "The Three Steps in the Evolution of the Law of Nations,"[1] by Prof. C. Van Vollenhoven, of the University of Leyden. There is also another sort of suspicion aroused at reading the author's admiration for William Jennings Bryan and Christian De Wet—not in their respective capacities as orator and raider, where admiration would not be misplaced—but as exponents of International Law. Nevertheless the Professor's essay is well worth reading.

His first stage—the hobbledehoy period—runs from 1570 to 1770. "One may as well look for snow in the dog-days, as for endeavour to promote international order in the Law of Nations during the 16th and 17th centuries. And hardly anyone requires it, for that matter. Most princes and governments—they may be called Maurice of Orange, or the Great Elector, Cromwell, or Charles the Twelfth—have but one object: to secure paramount power for their country, to make and keep their country so strong as to be safe from the attacks of others. If they succeed in this, either alone or allied with other powers, they become, indeed, for the greater part, a danger for the weaker nations at once; but the Law of Nations is not concerned with that. Hence it is possible for a sprightly-minded author like Hübner to write as late as 1759, that the Law of Nations of his day consists for seven-eighths of rules concerning ceremonial; it is for this reason that this Law of Nations offered no remedy at all, when Louis the Fourteenth in years of absolute peace impresses foreign merchantmen with crew and all, for trading in the service of France, without any compen-

[1] The Hague, Martinus Nyhoff: The Carswell Co., Ltd., 75c.

sation; and hence it is that all this Law of Nations in practice amounts to nothing but the right of the strongest—people going to war for every trifle. The politician knows that and is resigned. The states of the period have to learn the art of living side by side, and mutually to adapt themselves; it is all they can do as yet. Modern Law of Nations presupposes fixed boundaries, but at that time boundaries were for ever changing; towns like Bois-le-duc and Maestricht, the strip of land between Flanders and France, the country of Lorraine, clearly prove this." "And yet, however curious it may seem, this first stage has never provoked any resentment. Why not? Because it never pretended to greater excellence than it possessed, because people knew what it was worth. It was unlovely, pitiable, characterless; but it was honest."

Where does Grotius come in?

"Grotius was the envoy of Sweden at Paris (1635-1648), when Richelieu was at the height of his power (1624-1642); he is living near or in Paris, when the Cardinal is appointed a minister. But the contrast between the two men could hardly be more flagrant. Richelieu, the brilliant representative of a noble but ambitious people at a time of unbridled international anarchy; Grotius, considering his embassy, which in practice is not much of a success, as a mission-station from which he can labour for his creed concerning the Law of Nations. The two men passed each other by; on either side they found but scanty respect for one another; and the Cardinal, no doubt, believed not a word of the book of 1625, so pompously dedicated to his royal master, if indeed, he took the trouble at all to read in it for one hour in his life.

"And yet Grotius's doctrine, according to some, was acknowledged as the law of Europe before the end of the century—before the end of the century whose policy was still completely Richelieu's!"

So that in the first stage of the Law of Nations, Grotius and Confucius were equally influential!

In our Professor's second stage from 1770 to 1914 Grotius was a name to conjure with—the conjurer in chief, Vattel, taking care to entirely misconstrue the original fetish. Grotius had a well-developed theory of crime and punishment in international relations.

"Vattel may possibly have been a good man in the opinion of his relations and domestic servants; but he gave a Judas-kiss to Grotius's system.

"Can this be proved?

"When confronted by the opposed opinions of Richelieu and Grotius, between the system of 'paramount power,' which refuses to account for its deeds and desires to go its own way; and the system which arraigns state crimes—Vattel sides wtih Richelieu; he sides with Richelieu, and calls his unbridled arbitrary dealings 'sovereignty.' With Grotius sovereignty means supreme control of a country's home affairs and a country's internal development — but by no means a license to commit a crime or some other injustice; for what remains in that case of that Law of Nations which holds the states together? According to Vattel, not anybody, whosoever, is entitled to give an opinion as to whether a state may possibly commit a crime or other injustice with the exception of the sovereign state alone."

"According to Grotius, the criminal state may be punished by the others. According to Vattel, even the country invaded, foaming at the mouth with anger, may not judge of the assaulter of its territory. *'Nous ne sommes point reçus à nous plaindre de lui, comme d'un infracteur du Droit des Gens.'* How could the learned and discerning Grotius (he elsewhere observes) err so much as to ascribe even to a neutral nation a right to judge of the conduct of a sovereign state?"

After describing the efforts of Conferences at the Hague and of benevolent statesmen to reform this second Law of Nations, our Professor concludes:

" It was not to be. On Monday, August 3rd, 1914, at a quarter to seven at night, the authorities at Paris

opened the Berlin telegram, containing the declaration of war. On Tuesday, August 4th, at breakfast, everyone knew that Vattel's Law of Nations had become bankrupt. Not *the* Law of Nations, not *all* Law of Nations, but this misshapen conglomeration of hypocrisy and cynicism, of whining about immutable duties of states, and of indulgence about every sin of which a state was guilty. What Grotius and Gladstone, the Czar and Bryan could not effect, what all the menacing episode till 1914 could not effect, was brought about by one blow in August, 1914; the scales fell from all eyes, the rottenness of Vattel's product was exhibited to all the world, the Law of Nations which had been triumphant for a century and a half was smashed to bits."

Following Grotius—as Grotius wrote—the author comes to some conclusions with regard to "neutrality" and the "open sea" that seem sound, but which we should not have expected to come from a Dutchman.

"Well then, what was an abomination to Grotius, has become an abomination to millions in belligerent and neutral countries during the present war. They say with President Wilson that neutrality in a war like the present is intolerable; with the Brazilian Barbosa they say that the present deaf-mute and frigid neutrality must yield up its place to a new sort of neutrality which feels and judges. Why? Because they deeply feel that to kindle a war (putting aside the question which side was responsible in 1914), is criminal; that it is the greatest crime which a state may perpetrate; and because they regard the war waged by the adversary as a punishment. They reproach governments which conform to the rules of neutrality of the second Law of Nations with unmanliness and the lack of insight into the new era. If they are answered that those governments *have* to adhere to them, *because these rules are laid down in the binding treaties of 1907,* they only reply that those treaties should be replaced by a new Law of Nations, the

sooner the better; by a Law of Nations which suits the conscience of present-day humanity."

"The other item is concerned with 'the open sea.' The second Law of Nations had crammed into people —and the treaties express as much—that in the customary war, waged for the sake of fighting, netural commerce may only be impeded on account of one of three reasons: on account of breach of a lawful blockade at sea; on account of transporting contraband by sea; and on account of breach of neutrality, by giving aid at sea. A 'desideratum' of the Second Peace Conference of 1907 went farther still in this direction: commercial and industrial intercourse between belligerents and neutrals—it said—should be very specially protected. Not only has all this (being a residue of treaties dating from the First Law of Nations) nothing to do with the 'open sea,' which Grotius advocated and enforced—his 'open sea' only means that a state may not claim the sea as its own, nor monopolize peaceful sea traffic—but all this is even in flat defiance of the principle of Grotius's punitory war. When in April, 1599, the Netherlands attempted to overcome Spanish militarism, whose leaders evidently will not rest 'till all have bowed their necks under the Spanish yoke,' they resolve, authorized by Barneveldt himself (the republic being only twenty years old), to blockade Spain by sea, and even by land, cutting off all trade and however angry seafaring nations may be at this, Grotius warmly applauds the measure."

The author's last words may be prophetic.

"Grotius's Law of Nations stands at the door, and it knocks. For three hundred years we have let it knock. Now it is getting too strong for us. We have not yet turned the key, but the bolts have been drawn."

Perhaps Professor! perhaps! But there are a few fellows still living that like the idea of your honest old First Stage, when they go to it à la Richelieu, and the winner takes all.

THE COUNTY JUDGES ACT, 1919.

For some time past the County and District Court Judges have been urging upon the Dominion Government the necessity of an increase in their present salaries, and it is generally understood that such an increase has been promised upon the condition that the number of Judges, and especially of Junior Judges, should be decreased. On April 28th, 1919, the Acting Minister of Justice, in reply to an inquiry in the House by a member from another province, made the following statement: "There are several vacant County Court judgeships, inclusive of the one referred to by the hon. member, but this Government having suggested to the various Provincial Governments that they should take into consideration the reduction of the County Court judiciary in each province, by amalgamation or otherwise, I have not thought well to recommend to council the filling of the present vacancies."

It was presumably in view of this suggestion from the Justice Department, that the above mentioned Act was introduced at the last session of the Ontario Legislature. This Act received its third reading on April 15th, and was assented to on April 24th, but, by section 6, it shall not come into force until a day to be proclaimed by the Lieutenant-Governor.

Under the present section 5 of "The County Judges Act," R. S. O. 1914, chapter 58, provision was made for the appointment of a Junior Judge in every county or district, the population of which exceeds 80,000, and also in every county in which a city is situated, and in several other counties and districts specifically named. By section 7, provision is made for the appointment of second and third Junior Judges in the County of York.

By section 2 of the new Act, section 5, above mentioned, is repealed, and the following substituted there-

for: "A Junior Judge may be appointed for each of the Counties of York and Wentworth." By section 3 it is provided that the repeal of said section 5 shall not affect any appointment of a Junior Judge heretofore made. Section 7, above mentioned, is not repealed, so presumably the County of York will still be entitled to a Senior and three Junior Judges. It will also apparently be still permissible to appoint new Senior Judges in all counties now having the right to two Judges.

By section 4 of the amending Act, new sections numbered from 20 to 26 inclusive have been added. Several of these new sections are substantial re-enactments of sections 19 to 25 inclusive, of R. S. O. 1897, c. 54, which were first enacted in 1876, and were then commonly known as "The Grouping Act." The constitutionality of these provisions came before the Queen's Bench Division in 1885, in *Gibson* v. *McDonald*, 7 O. R. 401, on an application for prohibition to restrain proceedings to enforce an order of the General Sessions of the County of Renfrew, which were presided over by the County Judge of Lanark, under the provisions of these sections. It was held by Armour and O'Connor, JJ., that the County Judge of Lanark had no power to preside at the Sessions in the County of Renfrew, the sections authorizing him to do so being *ultra vires*. Wilson, C.J., upon this point gave no positive opinion, but inclined to the opposite view. These sections were however still continued in the Revised Statutes of 1887 and 1897, but in the revision of the Act, made in 1909, preparatory to the general revision of 1914, the previous Act was entirely repealed, and the repealing section contained the following sub-section: "(2) Notwithstanding the repeal of sections 19 to 28 of the said Act, any district or group formed under the provisions of the said section 19, and now existing, shall continue to exist, and the provisions of the said sections shall continue to apply to such district or group." I understand, however,

that in consequence of the decision in *Gibson* v. *McDonald,* the Judges in "grouped" counties ceased to hold County Courts in other than their own counties, and I am not aware of any group in which the above saving clause has had any practical application. For some reason no action was taken, in consequence of the decision of the Supreme Court hereinafter referred to, which virtually overruled the above decision, although the latter was not referred to on the agreement.

In 1891 a somewhat similar question arose in British Columbia in the case of *Piel Ke-ark-an* v. *Reginam.* under section 14 of chapter 25 of the Revised Statutes of that province, which authorized a County Court Judge to act as such in certain cases, in a district other than that for which he was appointed. While the matter was pending, the Dominion Parliament passed an Act, 54-55 Vict. c. 28, the first two sections of which are now substantially contained in sections 30 and 31 of R. S. C. 1906, c. 138. These sections are as follows:—

"30. The jurisdiction of every County Court Judge shall extend and shall be deemed to have always extended to any additional territory annexed by the Provincial Legislature to the county or district for which he was, or is appointed, to the same extent including such additional territory.

"31. It shall be competent to any County Court Judge to hold any of the Courts in any county or district in the province in which he is appointed, or to perform any other duty as a County Court Judge in any such county or district, upon being required so to do by an order of the Governor-in-Council, made at the request of the Lieutenant-Governor of such province.

"(2) The Judge of any County Court may, without any such order, perform any judicial duties in any county or district in the province on being requested so to do by the County Court Judge to whom the duty for any reason belongs.

"(3) The Judge so required as aforesaid shall, while acting in pursuance of such requisition or request, be deemed to be a Judge of the County Court of the county or district in which he is so required or requested to act, and shall have all the powers of such Judge."

A proviso was added in the original Act, that this legislation should not affect any litigation then pending in the Courts, in which any question had been raised as to the jurisdiction of a Judge beyond the limits of the county or district for which he was originally appointed. The Supreme Court of British Columbia had in the meantime decided against the constitutionality of the Provincial Act, 2 B. C. R. 53. This decision was subsequently overruled by the Supreme Court of Canada on a reference to that Court by the Governor-General-in-Council: *Re County Courts of British Columbia,* 21 S. C. R. 446; so that the above legislation was virtually declared to be unnecessary.

The new section 26, contained in the amending Act, is of sufficient importance to be quoted in full, and is as follows:—

"26. Where a vacancy occurs in the office of the Judge of the County Court in any county included in a County Court district, and the Lieutenant-Governor declares that, owing to the lack of sufficient business, it is unnecessary that the vacancy should be filled, the remaining Judges in the district shall arrange for the performance of the duties of the Judge of the County Court of the county in which the vacancy occurs by one of themselves or by some other person competent by law in that behalf, and every Judge or other person so acting shall have the like powers, and shall perform the like duties as a Judge or other person competent by law in that behalf appointed or authorized for that purpose may exercise and perform under any statute of Ontario in the county in which the vacancy has occurred."

This is a very radical piece of legislation, as it may result in some counties being eventually deprived of a resident Judge. It was expressly provided by section 7 of the Act of 1876, above referred to, that "there shall continue to be a resident Judge in each of the counties .or united counties now having a County Judge." While this legislation was not expressly continued in the subsequent Acts, the spirit of it has continued to govern.

Section 5 of the new Act makes provision for annual allowances to County and District Judges. The fees provided for the Senior and Junior Judges in the Counties of York, Wentworth, Middlesex and Carleton are similar to those which they now receive as Judges of the Surrogate Court in their respective counties. The provisions for the Junior Judges of Middlesex and Carleton, however, expire with the present occupants of these offices, as no provision is made by section 2 of the Act for the appointment of a Junior Judge in either of these countries in the future. It is further specially provided that where any of the Judges in these four counties ceases to hold office, his successor, if any, shall receive only $1,000 a year. The provision for the junior Judges of York and Wentworth in the first sub-section of this section seem to be also covered by sub-section (2) (*a*) as it is presumably not the intention to give these two Judges a double allowance.

In all other counties, the Judge, or where there are more than one, the senior Judge is to receive $1,000 a year, which is to cover all fees as Judge of the Surrogate Court and Local Master. These provisions, however, are not to deprive the present Junior Judges in other counties than the four above mentioned, of the same amount of surplus surrogate fees as they would have been entitled to if the Act had not been passed. There appears, however, to be some inconsistency as regards Judges of District Courts, between this provision and the present section 17, of "The County Judges

Act." This section, which is not expressly declared to be repealed, is as follows: "17. In lieu of the fees otherwise payable to him under the Surrogate Courts Act, and for services performed under the Mechanics' and Wage Earners' Lien Act, the Woodman's Lien for Wages Act, and the Rivers and Streams Act, there shall be paid to every Judge and Junior Judge of a District Court, the sum of $500 per annum, and the fees heretofore payable in money under any of the said Acts, shall be payable in stamps, and shall form part of the Consolidated Revenue Fund."

If sub-section 3 of section 5 is intended to operate as a virtual repeal of this section, then the Junior Judges in any of the districts will, at once, upon the Act coming into force, cease to receive this allowance of $500, while the Judges or Senior Judges will have their allowance increased to $1,000. All District Court Judges are also apparently deprived of any additional fees which would be payable under the various Acts mentioned in the above section 17. The concluding words of sub-section 3 are, however, qualified by sub-section 4, which preserves to a Judge the fees to which he is now entitled under certain statutes; but the reference to offices "to which any annual allowance or salary may be attached," is not clear.

Ottawa. M. J. GORMAN.

SITTING AT THE FEET OF GAMALIEL AMERICANUS.

The Allies won the Great World's War. The Americans were a bit late for parade. However, they got into action at last, not in proportion to their strength, but sufficiently to suffer nearly as many casualties as this modest little contributor, Canada. But, if their actual fighting contribution was tardy, there is at least no self-effacement about their claims to the glory and no bashfulness about their pretensions to settle the terms of peace. The Prussians, who always claimed to have won the battle of Waterloo, have their apostolic successors in those who erected in American cities the streamers "We Won the War."

But small as has been the toll of human sacrifice paid by the United States, their contribution in advice is enormous. Also it is founded on wisdom matured amidst American conditions and made erudite by the study of the Federalist and Daniel Webster's speeches. To this extensive repertoire of the New World nation-mongers, Mr. James Brown Scott has added "James Madison's Notes of Debates in the Federal Convention of 1787, and their Relation to a more Perfect Society of Nations."[1] The main idea is modestly expressed in the preface:—

> "For years past the writer of this little book has been of the opinion that the Federal Convention of the States which formed the Constitution of the United States was in fact as well as in form an international conference. For this reason he is firmly convinced that the proceedings of the convention are therefore of interest in this day of international conferences, as showing the steps by which the thirteen States of the Western World claiming to be sovereign, free and independent were able to form the one large, successful and enduring union of States to be found in the annals of history."

This book, topographically excellent and redolent of that exaggerated veneration which Americans have

[1] Oxford University Press, American Branch, 35 West 32nd Street, New York, $2.00.

begun to assume for the founders of that experiment, their constitution, will be a joy to many who will live to see that inelastic constitution again rudely tried. We are carried back breathless to Philadelphia on the second Monday in May, 1787.

"ACCOMPLISHING THE IMPOSSIBLE."

"What was to take place? Chastened by the experience of eleven years of anxiety and apprehension, what would the conference bring forth? Could the States possibly create and maintain a more perfect union, based upon the separation of the powers of both, and upon the recognition of the interdependence of each? It seemed impossible. Nevertheless the fifty-five delegates to the convention, of which Thomas Jefferson said with pardonable exaggeration, 'it is really an assembly of demi-gods,' accomplished the impossible by good will, concession and compromise."

Throughout his book Mr. Scott labours his point: the "International Significance of the States of the Union," complaining that this international aspect "has been strangely overlooked because of the tendency to regard the United States as a unitary nation instead of a union of States." We Canadians do not see anything strange about this; we do not recognize Americans as Pennsylvanians or Ohians. On the contrary to us they are a "unitary nation," and we admire their apparent solidarity as Americans; one American blows very much like another.

The United States Supreme Court throws Mr. Scott into ecstacies—

"It offers the nations a model and a hope of judicial settlement of their controversies which, if they are to be got out of the way after the break-down of diplomacy, can only be settled by war. If the nations only will they may make a union of any of their number for judicial settlement and that by simply a treaty convention, compact or agreement creating the Court, granting it jurisdiction, defining its procedure, to be set in motion by the plaintiff, *leaving the execution of the judgment*, as in the case of an arbitral award or of a decision by our Supreme Court, *to the good faith of*

the contracting parties; and it is done. The example of the American States shows the way to do it. The procedure of the Court of the several States shows the feasibility of doing it. The agony of Europe shows that it must be done if the blood and treasure of the future are to be saved from the catastrophes of the past."

Imagine leaving the execution of the judgment (if unfavourable to him) to the good faith of Frederick the Great, or any of his descendants!

These learned Americans make two mistakes: First, they assume that institutions which suit English-speaking peoples will fit everybody; just as a certain English Governor insisted on introducing trial-by-jury into Corsica. Second, they assume that their constitution of 1787 succeeded. The truth is that it failed. It was voluntary and non-coercive. After the usual statesman's remedy for internal blood-pressure, foreign wars—one aggressive against Canada and another predatory against Mexico—the voluntary and non-coercive constitution burst in 1861. After Grant got through at Appomattox, the United States became a "unitary nation" with good chances of survivorship on account of all speaking the one tongue, and the youth of the country being chiefly absorbed in baseball. But their attempt at a voluntary and non-coercive society of nations resulted, as we know, in quite as bloody a catastrophe in proportion to population as the recent war in Europe.

The hard fact of secular as well as sacred history is that the text "the land had peace for forty years," always follows an account of somebody being well and thoroughly fought out. From this view-point of human experience the Europeans and the British Dominions can be relied on for forty years of pacific endeavour, and the American—who has merely sipped at the cup of fury—far from being a source of restfulness, is a potential danger.

Hon. George Sutherland, ex-Senator from Utah, has written a quite moderate, and at the same time red-blooded contribution to the discussion now going on as to the extent and limitations of the *external*

powers of the United States Government. His "Constitutional Power and World Affairs,"[1] gives in a readable form without too much tiresome American antiquarianism, a clear view of the powers as he conceives them to now exist of the National Government.

He is quite free equally from blatancy and pacifism:—

"The first requisite of military preparedness is an adequate navy. While it is true that the absence of an adequate English army probably precipitated the war, and undoubtedly prolonged it, it is no less true that only the strength and readiness of the British navy prevented the war from resulting in the subjugation of Europe. For three years it was literally true that the battleships of Great Britain stood between the democratic world, ourselves included, and supreme disaster. That risk we must never incur again."

"The bitter lesson of this war is that military strength cannot be improvised, and we should not again permit ourselves to be lulled into a false sense of security by the fatuous suggestion of a million citizens springing to arms over night—a suggestion which might have been substantial if only the citizens had been taught to spring, and provision had first been made to have the arms within reasonable springing distance."

Probably the chapter of Mr. Sutherland's book which will have most interest for non-Americans is that on "The Treaty-making Power, How far Limited." Those of us who wondered at certain manifestations of national impotency, when foreigners were being murdered in various parts of the United States, will be relieved to learn that the National Government was merely ignorant of its powers.

"No theory has been more earnestly debated nor has given rise to more pronounced differences of opinion, than that which challenges the validity of a treaty stipulation disposing of a matter which otherwise would fall within the reserved powers of the states; and especially which would fall within their police powers."

"If it be necessary to have confirmation of the self-evident, it may be borne in mind that one of the prime reasons for the incorporation of Article VI in the Constitution, so far as it applies to treaties, was that, under the Confederation, treaties had been notoriously disregarded by the states, and state laws conflicting

[1] New York, Columbia University Press.

with treaty stipulations granting individual rights and privileges had been enforced by the state governments. The treaty of 1783 by which peace was made with Great Britain was thus openly and flagrantly defied. That treaty provided that the loyalists whose property had been confiscated under state laws should be compensated for their losses; that impediments to the collection of debts due to British subjects should be removed; and debts paid in the equivalent of British money. Notwithstanding these solemn engagements on the part of the Nation, some of the states passed laws which, in effect, nullified them. As a consequence, the British declined to surrender certain forts which they had agreed to surrender."

"This condition of affairs, which the Confederation was utterly powerless to remedy, was the occasion of apprehensive solicitude everywhere among thoughtful men. To permit it to continue was to sap the sovereignty of the Nation and render it contemptible in the sight of all other nations. The anomaly of a sovereignty with power to promise but none to perform could not endure. Either the treaty-making power of the Nation must be made supreme in fact as well as in theory or the complete supremacy of the states and the disintegration of the Union be allowed to supervene. A division of authority in a matter where singleness of authority was vital had become intolerable and impossible. The power to make treaties, like the power to wage war, was something which the nation must possess beyond the peradventure of state interference. The intention of the Framers to so provide cannot be doubted, since a necessity so pressing could not be put aside. They began by reaffirming the power to the Nation and make assurance doubly sure by denying it to the states. And then, to remove all possibility of state interference through the exercise of any conceivable state power, they declared that treaties should be the supreme law of the land, "anything in the Constitution or laws of any state to the contrary notwithstanding" In the face of this imperative language, to insist that a treaty otherwise valid is nevertheless subject to the controlling force of a law passed in pursuance of the police powers of a state, is to blot out the words "anything notwithstanding" and substitute "nearly anything notwithstanding," and to convert that which is declared without reservation to be supreme into something subject and subordinate."

"The conclusion to which we have come is of great practical importance, for if the claim of supremacy for state police power over treaties be conceded, we are certain, sooner or later, to become involved in conflict, as we have already been in controversy with other nations. The contention over the exclusion of the Japanese from the public schools in California and later over the land question are still fresh in our minds. Only the exercise of great tact, forbearance and patience on the part of the responsible officials of both countries, prevented an embarrassing situation from becoming dangerously critical. Whether the proper construction of the treaty involved would justify the claims of the

Japanese government or those of California is fairly open to question; but that the treaty-making power of the United States is competent to accord the privileges which were claimed for the subjects of Japan is not, in my judgment, open to legitimate dispute. Not only is it clear that state constitutions and state laws, of whatsoever character, must yield in case of conflict; but an opposite conclusion would be gravely unfortunate, since it would place it in the power of a state to over-ride and confound the national will in matters where the opportunities of the national authorities for accurate and dependable determinations are far better than those of the state authorities, who, not realizing the delicacy of the questions involved, might bring the Nation to the verge of war in an effort to uphold the policies of a single state. The story of the conditions in this respect under the Confederation constitutes a warning which we can never afford to disregard.

"That there should ever have been any doubt as to the complete supremacy of the national power in all matters of foreign relation is an anomaly that, under the new and enlarged world responsibilities we are assuming, is no longer tolerable. The eyes of foreign governments see only the Nation. State boundaries are as meaningless to them as county boundaries in Great Britain are to us. In *Chisholm* v. *Georgia*, Mr. Justice Wilson said: 'As to the purposes of the Union, therefore, Georgia is not a sovereign state;' to which may be added: '*and for the purposes of external sovereignty the state of Georgia does not exist.*'

"If an American citizen should suffer outrage at the hands of a mob in Devonshire, or the county of Cork, we should look to London for satisfaction. If an Englishman be similarly maltreated in Maine or Colorado, it is incomprehensible that Washington may not be held internationally accountable. Concede the theory of state supremacy, however, and the treaty rights of a foreigner may be grossly violated by the action or through the neglect of a state without remedy or redress—the Nation taking refuge behind the claim of state sovereignty and the state escaping because it is not an international person nor bound by the treaty. The suggestion is not fanciful. In 1880 certain Chinese, resident in Colorado, were, because of their race, brutally assaulted and murdered and their property destroyed by a mob. The Secretary of State, replying to the Chinese Minister, asserted the utter helplessness of the national government in the matter. The same thing occurred in the case of certain Italians who were the victims of mob violence in Louisiana.

"But it is not true that the national government is thus powerless to vindicate its treaty obligations. Neither in the enforcement nor in the making of treaties is it limited by or dependent upon state power. It is the government of a completely sovereign Nation, possessing, in the exercise of its powers, jurisdiction over every foot of territory and direct authority over every citizen within its limits. Within the scope of its powers it may move without regard to state lines or state functionaries or state laws or constitutions, sweeping aside every obstacle sought to be

interposed by individual or state authority, compelling obedience with all the powers of an unfettered hand, and answerable for what it does to the people of the nation alone.

"If the perpetrators of violence against the person and property of the foreigner living under the protection of our flag have gone unpunished, it is not from lack of power but from lack of action on the part of the national government. The power of that government is ample. It may by legislation penalize individuals who conspire to interfere with or violate, or who participate in the actual interference with, or violation, of treaty rights and privileges; it may use the army of the United States and, if necessary, call forth the state militia itself, to enforce this legislation, and preserve these rights and privileges; it may invoke the powers of the national courts to restrain violations and interferences in cases where that remedy is appropriate. In one way or in another whatever the government of the United States has the right to promise it has the power to enforce."

THE AUTOCRACY OF WORKMEN'S COMPENSATION BOARDS.

That there may be a limit to the freedom from review of a Workmen's Compensation Board appears from the following case. An order having been made in disregard of "the elementary principle of law that a man shall not suffer in person or in property unless he has had an opportunity of being heard," the Court of King's Bench in Manitoba interfered with and restrained the inferior Court (the Board). In this case it was admitted that the order had been made by the Board without notice to the employers.

CANADIAN NORTHERN RAILWAY COMPANY v. HERBERT GEORGE WILSON, ET AL.

GALT, J.—This is a motion for an injunction to restrain the defendants, who are members of the Board of Commissioners, appointed under the Workmen's Compensation Act, 1916, from filing in the Court of King's Bench an Order made by the Board.

The statement of claim shows:

(1) That the defendants Herbert George Wilson, Andrew R. D. Paterson and Charles W. H. Kennedy are directors of the Workmen's Compensation Board appointed under the authority of section 46 of the Workmen's Compensation Act, as amended.

(2)That one William John Craig, deceased, had been in the employment of the plaintiffs as a machinist, and shortly before his death was engaged in repairing the cab of an engine which was undergoing repairs in the plaintiffs' shops at Ft. Rouge, and that while the said Craig was in the said cab he died from oedema of the brain, secondary to chronic nephritis.

(3) That on or about the 5th day of December, 1917, the defendant Wilson, assuming to act as Commissioner under the Workmen's Compensation Act, ordered the plaintiffs to pay to Mary Craig, widow of the said deceased, the monthly sum of $20.00 (twenty) dollars, so long as she should live and remain unmarried, and to pay certain smaller sums to Mary Craig's children.

(4) That the plaintiffs have always objected to the jurisdiction of the defendant Wilson to make the said order, upon the ground that the said William John Craig died of natural causes, and that his death was not caused by an accident arising out of, nor in the course of, his employment as required by section 3 of the said Act.

(6) The defendants now threaten to file the said order in this Court as provided in section 60, and unless restrained by an order of injunction of this Honourable Court, the plaintiffs fear that the said order may be filed, and the same will thereupon become a judgment of this Honourable Court under the provisions of the said Act.

The plaintiffs ask for a declaration that the said order was made without jurisdiction and is null and void; and for an injunction restraining the defendants from filing the said order.

Upon the hearing of the motion Mr. Hoskin, K.C., raised two preliminary objections to the motion, namely:

Firstly—The form of the action is misconceived, for if any remedy exists it should be asserted against the Board, which is created a corporation under the Workmen's Compensation Act, and not against the individual members.

Secondly—The Court has no jurisdiction to deal with any transactions by the Board, as all such interference by the Court is expressly taken away by the Workmen's Compensation Act.

With regard to the first objection Mr. Hoskin stated that there were substantial questions to be argued affecting the construction of the Act, and for this reason he would facilitate the argument by consenting that the Board of Commissioners should be substituted for the individual defendants.

Mr. Clarke, K.C., explained that he had framed the action against the individual members of the Board in order to avoid the appearance of bringing an action against the Crown, as might be held if the Board whose expenses are partially paid by the Crown, were made defendants.

In order to avoid possible difficulty I now permit the plaintiffs to amend their statement of claim by adding the Board as a party defendant.

The second objection presents a good deal more difficulty. The constitution of the Workmen's Compensation Board is dealt with in Manitoba Statutes, 1916, ch. 125, ss. 46-64, from which I quote the following provisions:

(46) There is hereby constituted a commission for the administration of this Act to be called "The Workmen's Compensation Board," which shall consist of a Commissioner to be appointed by the Lieutenant-Governor-in-Council, and shall be a corporate body.

(52) The Board shall have the like powers as the Court of King's Bench in Manitoba or a judge thereof for compelling the attendance of witnesses and of examining them under oath, and compelling the production of book, papers, documents and things.

(55) The commissioner shall sit at such times and conduct his proceedings in such manner as he may deem most convenient for the proper discharge or speedy dispatch of business.

(57) (1) The Board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect of which any power, authority, or discretion is conferred upon the Board, and the action or decision of the Board thereon shall be final and

conclusive and shall not be open to question or review in any Court and no proceedings by or before the Board shall be restrained by injunctions, prohibition or other process or proceeding in any Court or be removable by *certiorari* or otherwise into any Court.

(2) Without thereby limiting the generality of the provisions of sub-section (1), it is declared that such exclusive jurisdiction shall extend to determining—

(a) whether any industry or any part, branch or department of any industry falls within the provisions of this Part;

(b) whether any part of any such industry constitutes a part, branch or department of any industry within the meaning of this Act.

(3) Nothing in sub-section (1) shall prevent the Board from reconsidering any matter which has been dealt with by it or from rescinding, altering or amending any decision or order previously made, all of which the Board shall have authority to do.

(58) The Board may award such sum as it may deem reasonable to the successful party to a contested claim for compensation or to any other contested matter as compensation for the expense he has been put to by reason of or incidental to the contest and an order of the Board for the payment by an employer of any sum so awarded, when filed in the manner provided by section 60, shall become judgment of the Court in which it is filed and may be enforced accordingly.

The functions to be performed by the Workmen's Compensation Board are set forth in the earlier sections of the Act, from which I quote the following:

33. (1) Where in any employment to which this Part applies, personal injury by accident arising out of and in the course of the employment is, after a day to be named by proclamation of the Lieutenant-Governor-in-Council, caused to a workman, his employer shall be liable to provide or to pay compensation in the manner and to the extent hereinafter mentioned, except where the injury—

(a) does not disable the workman for the period of at least six consecutive working days from earning full wages at the work at which he was employed, or

(b) is attributable solely to the serious and wilful misconduct of the workman unless the injury results in death or serious disablement.

(2) Where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment, and where the accident occurred in the course of the employment, unless the contrary is shown it shall be presumed that it arose out of the employment.

11. No action shall lie for the recovery of the compensation, but all claims for compensation shall be heard and determined by the Board (without the intervention of counsel or solicitors on either side except with the express permission of the Board).

13. (1) The right to compensation provided by this Part shall be in lieu of all rights and rights of action, statutory or otherwise,

to which a workman or his dependents are or may be entitled against the employer or such workman for or by reason of any accident which happens to him while in the employment of such employer, after the day named by proclamation, as mentioned in section 3, and no action in respect thereof shall thereafter lie.

(2) Any party to an action may apply to the Board for adjudication and determination of the question of the plaintiff's right to compensation under this Part (or) and as to whether the action is one the right to bring which is taken away by this Part, and such adjudication and determination shall be final and conclusive.

The object of the Act appears to be to provide a tribunal for the speedy and final adjudication of claims for compensation advanced by persons, or their representatives, who have incurred personal injury or death by accident arising out of and in the course of their employment.

What, then, is the nature of the corporation called the Workmen's Compensation Board? Owing perhaps to the fact that the only points discussed in the argument were preliminary objections, the learned counsel did not address themselves to certain features of the Act which I find important in the view I take of the situation. It was pointed out that the Board had been created a corporation, but I did not understand either counsel to contend that the Board was in truth a Court.

In *The City of Winnipeg* v. *Winnipeg Electric Railway Co.* (*re* Public Utilities Act), 26 Man. 584, the Court of Appeal had to construe the Public Utilities Act, R. S. M. 1913, ch. 166. The case arose on an appeal by the Winnipeg Electric Railway Company from two orders made by the Public Utilities Commissioner. The framework of the Act there in question is very similar to that provided in the Workmen's Compensation Act. The Court was equally divided in its judgment. Howell, C.J., and Richards, J.A., held that the Court could not pronounce the Act *ultra vires*, and that certain sections of the Act conferred upon the Commissioner jurisdiction to make the order in question, and the Act expressly took away all power from any Court of reviewing his decision upon questions both of law and of fact. Perdue and Haggart, JJ.A., held that those portions of the Act which provided for the appointment of the Commissioner and payment of his salary by the Provincial Government are *ultra vires* of the legislature. But it seems to be recognized by all the judges that the Public Utilities Commissioner had been created a Court.

I am of opinion that the Workmen's Compensation Board is legally a Court. I am furthermore of opinion that it is an inferior Court within the meaning of that term as used for the purposes of prohibition, and explained fully in 9 Hals. p. 8, *seq.* It is a Court of very limited jurisdiction compared with the Court of King's Bench. See *James* v. *S. W. Rly.*, L. R. 7 Ex. 287 (per Willis, J., at p. 290).

Having arrived at the conclusion that the order in question herein was made by an inferior Court of the Province, it next becomes necessary to consider what that Court has done to the detriment of the plaintiffs. Mr. Clarke, K.C., upon opening his argu-

ment, stated that on December 5th, 1917, the Workmen's Compensation Board made an order directing the Canadian Northern Railway Company to pay to the widow and children of William John Craig, deceased, moneys aggregating $6,321.20, and that this order had been made by the Board *without any notice to the Railway Company*. Strangely enough no direct allegation of this kind appears either in the statement of claim or in Mr. Clarke's affidavit supporting the motion. I thought there must be some mistake in Mr. Clarke's statement, but when I enquired of Mr. Hoskin, he frankly admitted the accuracy of the statement and attempted to justify the Board's proceedings by pointing out that under sec. 57, sub-sec. 3: "Nothing in sub-section (1) shall prevent the Board from reconsidering any matter which has been dealt with by it or from rescinding, altering or amending any decision or order previously made, all of which the Board shall have authority to do."

A similar contention to this was raised by the defendants in *Channel Coaling Co.* v. *Ross et al.*, 1907, 1 K. B. 145. But the Court held that any such alternative right did not disable the defendants from obtaining relief by way of prohibition.

Mr. Hoskin further stated that many other cases had been decided by the Board within the last few years in similar manner to the present one, and no complaint had yet been made to the Courts. It may be that the parties affected accepted the stringent provisions of section 57 (1) as excluding any possible complaint on their parts. But if, as a matter of fact, the deceased William John Craig met with his death *without the happening of any "accident"* within the meaning of the Workmen's Compensation Act, I am unable to see how the plaintiffs can be made liable to pay compensation under the Act. Mr. Hoskin argues that under section 57 all such matters and questions are expressly left to the discretion and decision of the Board, whose decision is to be final, and that no proceedings before the Board shall be restrained by injunction, prohibition or otherwise; and there is no provision in the Act requiring notice to be given by the Board to the employer of any proceedings the Board chooses to take. The Provincial Legislature, having complete power to enact laws affecting property and civil rights in the Province, would have the power doubtless to authorize the Workmen's Compensation Board to conduct its proceedings without notice to the party or parties concerned. But in so doing the Legislature would be introducing what might be termed a revolutionary change in British law, which one would expect to be expressed in the clearest language possible. The necessity for notice is well exemplified by the following case:

In *re Brook and Delcomyn*, 16 C. B. N. S. 402, it was held that although mercantile arbitrators are not bound by the strict rules of evidence, yet they cannot be permitted to transgress that fundamental principle of justice which declares that no man shall be condemned, either civilly or criminally, without being afforded an opportunity of hearing the evidence adduced against him, and offering his defence. It there appeared that two arbitrators, in respect of a contract for the sale of certain rape-seed, were unable

to agree, and they appointed an umpire; and that the umpire had, without any notice to the vendor or his arbitrator, inspected samples of the seed at the counting-house of the other arbitrator and also had had communications with the persons by whom the cargo had been inspected and the samples taken. The Court set aside the award. In delivering judgment, Erle, C.J., said, at page 414: "I have always a great desire to give effect to mercantile customs, and to the awards of mercantile arbitrators, unless they infringe upon the principles of wider importance. It is clear that parties may agree to refer their differences subject to any special terms and conditions they please as to the mode of conducting the reference. But this is not a reference with that wide discretion. The dispute is to be referred in the usual way. The usage of merchants is imported into the contract, and, if a lawful usage, will bind the parties. Two arbitrators having been appointed, Mr. Bevan on the part of Brook, and Mr. Cramer on the part of Messrs. Delcomyn, they proceeded to take evidence, but failed to agree. It was clearly the duty of each to lay before the other all the information which he possessed touching the matter in hand, and in case of difference, to appoint an umpire. The umpire, according to all usage, ought to be informed of everything which has come to the knowledge of the arbitrators. They are not bound by any technical rules; and I am of opinion that, however erroneous in point of law the decision of the arbitrators or of the umpire might be, neither party would have any legitimate ground of complaint. But the ground upon which I come to the conclusion that the law has been violated in this case, and that the usage relied on is contrary to the acknowledged principles of justice, is, that Bevan, one of the arbitrators, brought before the umpire evidence which never had been communicated to Cramer, the other arbitrator, and which Messrs. Delcomyn. consequently, never had an opportunity of meeting by contradictory evidence. This is not a technical objection. *It is one of the first principles in the administration of justice, that the tribunal which is to decide must hear both sides and give both an opportunity of hearing the evidence upon which the decision is to turn.* I am not by any means deciding this case on a point of form, but upon a matter of substance, and one of the last and deepest importance.

The question is whether the Legislature in enacting the Workmen's Compensation Act, has deprived the party or parties concerned of the right to notice by the Board of proceedings which will or may affect such parties. I can find no such provision, but on the contrary there are several provisions which, at least by implication, recognize the right to notice.

The following instances will suffice: Section 3, sub-sec. 2: "Where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment; unless the contrary is shown it shall be presumed it arose out of the employment." Then section 58 deals with "contested claims for payment." In all such cases notice to the parties affected would be manifestly essential. The plaintiffs

had a right to contend before the Workmen's Compensation Board that they were not liable in any respect to pay compensation under the Act; that no accident had happened, and that Craig came to his death under circumstances which absolved the plaintiffs from any liability to pay compensation.

One of the first questions which would have to be considered by the Board would seem to be: has there been a personal injury by accident? Under sec. 2, sub-sec. (a) of the Act, "accident" shall include a wilful and an intentional act, not being the act of the workman, and a fortuitous event occasioned by a physical or natural cause." Reading the second clause as an exception from what shall be deemed an accident it is difficult to imagine any occurrence which might not be an accident within the meaning of the Act. No argument was addressed to me in reference to this ambiguous provision.

With the above consideration in mind, it is now possible to deal with the second preliminary objection, namely, that this Court has no jurisdiction to interfere either by injunction or otherwise with the proceedings of the Workmen's Compensation Board. The Court of King's Bench is a Superior Court of Record. Its jurisdiction as set forth in sections 10 and 11 of the King's Bench Act is most comprehensive and certainly extends to prohibition of inferior Courts from dealing with matters beyond their jurisdiction. On the other hand, an inferior Court, when acting within its jurisdiction, cannot be restrained by prohibition no matter how erroneously it may decide on either facts or law. See *Re Errington*, 14 Ont. Law Reports, p. 75. Unless, indeed, the error complained of involves the doing of something "contrary to the general laws of the land," or "so vicious as to violate some fundamental principle of justice;" per Thesiger, L.J., in *Martin* v. *Mackonchie*, 4 Q. B. D. p. 732, and per Lord Cairns on appeal in L. R. 6 App. C. as at p. 440.

But an inferior tribunal cannot give itself jurisdiction *by deciding without evidence*, nor can it *refuse to go into evidence in order* to ascertain whether it has or has not jurisdiction. See *Brown* v. *Cocking*, L. R. 3 Q. B. at p. 675.

And where, as in the present case, there is no appeal from the Board's decision, the question whether the Board had or had not jurisdiction is a *fortiori* open to the Superior Court on motion for prohibition: *Thompson* v. *Ingham*, 10 Q. B. 710.

The Legislature has given to the Board under section 57 exclusive jurisdiction as to any matter or thing in respect of which any power, authority or discretion is conferred upon the Board. But suppose that the Board attempts to exceed its jurisdiction and to make orders in respect of matters not delegated to it. Suppose, for instance, that the Board thought fit to make a winding-up order against an employer company, would the company be without remedy? I cannot think the Legislature intended that. I conclude, therefore, that where the Board is shown to be acting without jurisdiction it may be restrained. The remedy in such case would be

by prohibition, and the proper Court to order it would be the King's Bench. If the individual defendants are rightfully suable, the remedy by injunction would be appropriate. Does it then appear that the Board has, in the present case, acted without jurisdiction? I think it does. For although the written material does not expressly show the absence of notice, counsel for the defendants has, with his usual candour, admitted it. The plaintiffs, in amending their statement of claim, should specially allege this want of notice, and verify it by affidavit.

I overrule both of the preliminary objections.

"A. C. GALT, J."

Sept. 9th, 1918.

PERDUE, C.J.M.—This suit is brought for the purpose of obtaining an injunction against the members of The Workmen's Compensation Board restraining them from filing in the Court of King's Bench a certain order of the Board directing payment of compensation to the widow and children of one William John Craig, deceased.

The facts of the case as alleged by the plaintiffs are fully set out in the judgment of Galt, J., from whom this appeal is brought. The allegations of importance are as follows:

Craig, the deceased man, was, on or prior to 15th October, 1917, in the employ of the plaintiffs as a machinist. While engaged in repairing the cab of an engine in the shop of the plaintiffs he died, as it is alleged by the plaintiffs, from natural causes. According to medical testimony before the Board the deceased was suffering from "oedema of the brain, secondary to chronic interstitial nephritis." On 5th December, 1917, the defendant Herbert George Wilson, who then was and still is the Commissioner under The Workmen's Compensation Act, 6 Geo. V. c. 125, made an order for the payment by the plaintiffs to the widow of the deceased of the sum of $20 each month so long as she should live and remain unmarried, and of the sum of $5 to each of the two children of the deceased until each child reached the age of eighteen years, and also the medical and burial expenses of the deceased, amounting to $80. The actual order made by the Commissioner has not been produced, but the provisions of it appear in his letter of 5th December, 1917, written to the general claims agent of the plaintiffs. In this letter, which is written by the Assistant Commissioner, a demand is made upon the plaintiffs for the immediate payment of the sum of $6.331.20 to meet the above mentioned monthly payments. The following is the clause in the letter explaining the reasons for the demand:

"In requesting your cheque for the above amount, we would remind you that in the event of the total sum being found inadequate to meet the pensions due and payable, your company may be called upon to make further payment in respect thereto, and in the same way, should the total pension payments prove to be less

than the above mentioned sum, the balance remaining will be placed to your credit as against any claims which may be outstanding at that time. In the meantime the unpaid portion of the award will bear interest at the special rate of 3½ per cent."

On the same day a further request was made by the Commissioner upon the general claims agent of the plaintiffs for the sum of $80 to cover burial and medical expenses of the deceased.

The affidavits filed on the motion for injunction show, and it is admitted by counsel for the defendants, that no notice of the proceedings leading up to the making of the above order was given to the plaintiffs. The plaintiffs had no knowledge of the order until they were notified by the above letters that it had been made.

At the time when the above order of the Commissioner was made, the other two defendants, Messrs. Paterson & Kennedy, were not members of the Workmen's Compensation Board. They were afterwards appointed as directors under the amendment of the Act passed at the last session of the Legislature; see Statutes of 1918, c. 105, s. 6. They were made defendants for the purpose of enjoining the members of the Board from filing the order in the Court of King's Bench and thereby making it a judgment of that Court under the provisions of section 60 of the Act.

When the motion for injunction came before Galt, J., the defendants raised two objections:—(1) That if any remedy exists it should be against the Board, which is a corporation under the Act, and not against the individual members; (2) that the Court has no jurisdiction to deal with any transactions of the Board as all such interference by the Court is expressly taken away by the Act; see section 57 of the Act.

As to the first objection, counsel for defendants stated that there were substantial questions affecting the construction of the Act, and that, for this reason, he would facilitate the argument by consenting that the Board of Commissioners should be substituted for the individual defendants; but objected to the members of the Board being made defendants personally. The learned Judge allowed the plaintiffs to amend the statement of claim by adding the Board as a defendant, the individual members of the Board by name remaining as co-defendants.

The second objection was dealt with at a great length by the Judge and overruled by him. He also allowed the plaintiffs to amend the statement of claim by adding to paragraph 3 thereof an allegation that "The said order was made without notice to the plaintiffs nor did the plaintiff have knowledge of the making of the same until notified by the Workmen's Compensation Board that the order had been made.

The appeal is brought from the order allowing the above amendments, no order for an injunction having been made.

The real question involved in this appeal arises under the second objection set forth as above.

Section 57 (1) of the Act is as follows:—

"57. (1) The Board shall have exclusive jurisdiction to examine into, hear, and determine all matters and questions arising under

this part and as to any matter or thing in respect of which any power, authority, or discretion is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any Court and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any Court or be removable by certiorari or otherwise into any Court.

The first part of the section down to and including the words "conferred upon the Board," declares the exclusive jurisdiction of the Board as to the matters, questions and things arising under the first part of the Act. Then follows the provision that the "action and decision of the Board thereon," that is, upon the matters, etc., in respect of which jurisdiction is conferred by the first part of the section, "shall be final and conclusive," and shall not be questioned or reviewed in any Court and that no proceedings of the Board shall be restrained by injunction, etc., or be removable by certiorari. I think the true construction to apply to the section is that where the Board has jurisdiction over any matter brought before it, its action or decision is final and not subject to question or review in any Court. It follows that if the Board attempts to deal with a matter over which it has not acquired jurisdiction, or if it fails to be governed by the provisions of the Act according to their true intent and meaning, its action, decisions or proceedings are not protected by the section, and a party affected might seek the remedies available to him in the Courts notwithstanding the provisions of section 57.

In support of this proposition, I would refer to the decision of the House of Lords in *Andrews* v. *Mitchell* (1905), A. C. 78. In that case a member of a friendly society was summoned before the arbitration committee for a breach of the rules. The respondent attended and evidence was given that the charge was well-founded and that the respondent had at first given an untrue account of the facts. The respondent was desired to withdraw and the arbitration committee in his absence expelled him from the society by a resolution of the committee, not upon the charge which he had been called to answer, but upon a charge of fraud and disgraceful conduct in giving an untrue account of the facts. Section 68 of the Friendly Societies Act 1896 (Imp.), governing the society and its proceedings, enacted that every dispute between a member of the society and the society should be decided in the manner directed by the rules of the society, and that the decision so given should be binding and conclusive on all parties without appeal, and should not be removable into any Court of law or restrainable by injunction. It was held by the House of Lords that this provision did not apply to a decision given by the arbitration committee without jurisdiction, and that there was not jurisdiction inasmuch as the committee had passed the resolution in the absence of the member and without giving him notice of the charge upon which he had been expelled, the rules of the society requiring that notice should be given in such a case. It was therefore held that the expulsion was null and void and that the Court

had jurisdiction to set aside the resolution expelling the member.

Wayman v. *The Perseverance Lodge* (1917), 1 K. B. 677, was a case also under the Friendly Societies Act. In that case while the plaintiff, who had been for many years the secretary of the defendant society, was away on his military duties, a complaint was made against him of misapplying the society's funds. He denied the allegation and some months later without giving him any notice of an intention to hold an inquiry or formulating any charge against him and without hearing him, the committee of management expelled him from the society under one of the rules which provided that an officer misapplying the funds of the society should repay the same and be expelled, without prejudice to his liability to prosecution for the misapplication. The rules of the society provided for the decision of disputes by arbitration. The plaintiff took proceedings against the defendants in the County Court for a declaration that the rule was *ultra vires* and void, and for an injunction and damages. The respondents contended that under section 68 of the Friendly Societies Act, which provided that every dispute should be decided in the manner directed by the rules of the society, and that the decision should be binding and conclusive and should not be removable into any Court of law or restrainable by injunction, the Court had no jurisdiction to try the action or grant an injunction. The County Court Judge overruled the objection of want of jurisdiction, made the declaration asked for by the plaintiff and granted the injunction claimed. Ridley, J., granted a writ of prohibition against the County Court, but on appeal to the King's Bench Division, Lush, J., and Bailhache, J., following *Andrews* v. *Mitchell*, allowed the appeal and restored the judgment in the County Court.

In the above cases the rules of the friendly society in each case required that notice of a charge against a member should be given to him before he could be expelled. But where the provisions of a statute do not expressly require notice to a party before taking proceedings against him under the statute *and do not dispense with the giving of notice*, it is a fundamental principle that the party must receive notice of the proceedings and that otherwise they do not bind him.

In the present case it is established by the plaintiffs and admitted by counsel for the defendants that no notice was given to the plaintiffs of the hearing of the application for compensation in respect of the death of the deceased, and that the plaintiffs had no knowledge of the making of the order until advised by the letters from the Commissioner above referred to. *It is an elementary principle of law that a man shall not suffer in person or in property unless he has had an opportunity of being heard.* This principle has been reiterated in case after case for the last three hundred years, not always expressed in the same words, but with the same force and meaning.

In *Baggs Case*, 11 Coke (Anno 1616), 93 b, it was held by the Court of King's Bench that the disfranchisement and removal of a burgess by the corporation of a borough, where it appeared that

the proceedings had been taken "without hearing him answer to what had been objected," and that he "was not reasonably warned," were void and should not bind him even though the corporation had lawful authority to remove him upon just cause. The report of this case intimated that the principle goes back to Magna Charta.

In Dr. Bentley's Case, *Rex* v. *Chancellor of the University of Cambridge*, 1 Stra. 557 (1723), Fortescue, J., said:

"The laws of God and man both give the party an opportunity to make his defence if he has any." This case is cited with approval by Maule, J., in *Abley* v. *Dale*, 10 C. B. 62, 71.

Abley v. *Dale* was a case in which a County Judge ordered a party to pay money on a future day or in default to be committed, and the party made default. It was held that the party could not be committed without being examined as to the cause of such second default.

In *Cooper* v. *The Board of Works for the Wandsworth District*, 14 C. B. N. G. 180, a section of the Metropolitan Local Management Act empowered the district board to alter or demolish a house where the builder had neglected to give notice of his intention to build seven days before proceeding to dig the foundation. It was held that this did not empower the board to demolish a building without first giving the party guilty of the omission an opportunity of being heard. Erle, C.J., said: "It has been said that the principle that no man shall be deprived of his property without an opportunity of being heard, *is limited to a judicial proceeding*, and that a district board ordering a house to be pulled down cannot be said to be doing a judicial act. *I do not quite agree with that;* neither do I undertake to rest my judgment solely upon the ground that the district board is a Court exercising judicial discretion upon the point; but the law, I think, has been applied to many exercises of power which in common understanding would not be at all more a judicial proceeding than would the act of the district board in ordering a house to be pulled down." He then referred to *Dr. Bentley's Case*, above quoted, and proceeded: "The district board must do the thing legally; there must be a resolution; and, if there be a board, and a resolution of that board, I have not heard a word to show that it would not be salutary that they should hear the man who is to suffer from their judgment before they proceed to make the order under which they attempt to justify their act." Byles, J., said: "It seems to me that the board are wrong whether they acted judicially or ministerially. I conceive they acted judicially, because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions, beginning with *Dr. Bentley's Case*, and ending with some very recent cases, establish that, although there are no positive words in a statute requiring that the party shall be heard, *yet the justice of the common law will supply the omission of the legislature.*" He then refers to *Dr. Bentley's Case* above cited. Willes, J., and Keating, J., were of the same opinion.

Capell v. *Child*, 2 Br. & J. 558, was a case where a statute enabled a bishop, if it should appear to his satisfaction either of his own knowledge or upon proof by affidavit, that the ecclesiastical duties of a benefice were negligently performed, to require the vicar to nominate a stipendiary curate, and the bishop made a requisition to this effect on the vicar founded on his own knowledge, without hearing the vicar. The Court of Common Pleas held the requisition bad. Lord Lyndhurst, C.B., thus expressed himself: "Does not this (the statute) import inquiry, and a judgment as the result of that inquiry? He is to form his judgment; it is to appear to him from affidavits laid before him; but, is it possible to be said that it is to appear to him, and that he is to form his judgment from affidavits laid before him on the one side, without hearing the other party against whom the charge of negligence is preferred, which is to affect him in his character and in his property? That he is to come to that conclusion, without giving the other party an opportunity of meeting the affidavits by contrary affidavits, and without being heard in his own defence—without having an opportunity even of being summoned for that purpose?"

In *Bonnacher* v. *Evans*, 16 Q. B. 162, where an order had been issued at the instance of a bishop to sequester the profits of a benefice, without notice to the incumbent of the benefice, it was held that the order was void for the reason that notice had not been given to the incumbent of the benefice. In giving the judgment of the Exchequer Chamber, Parke, B., said: "*No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless indeed the legislature has expressly or impliedly given an authority to act without that necessary proceeding.*" In support of this he refers to *Baggs' Case; Dr. Bentley's Case; Rex* v. *Benn*, 6 T. R. 198; *Harper* v. *Carr*, 7 T. R. 270; *Rex* v. *Caskin*, 8 T. R. 209; *Capell* v. *Child*, *supra*.

Smith v. *The Queen*, 3 App. Cas. 614, is a decision of the Privy Council on an appeal from the Supreme Court of Queensland. In that case the defendant and appellant, Smith had obtained from the Crown a lease of land for a term of ten years, subject to the requirements of an Act applying to pastoral and agricultural lands. Some time thereafter the acting Commissioner made a report to the Secretary for Public Lands that the lessee had abandoned the land and failed in performance of the conditions of residence. A few days later a proclamation was issued by the government declaring the lease to be forfeited and vacated. Ejectment proceedings were then commenced by the Crown for the recovery of the land. One of the grounds urged in defence was that no hearing of the defendant's case had taken place before the Commissioner. Sir Robert P Collier, in delivering the judgment of the Privy Council, held that the inquiry to be made by the Commissioner under the Act was in the nature of a judicial inquiry and that the defendant was entitled to a hearing before the Commissioner. His Lordship cited with approval the judgment of Erle, C J., and Bay-

ley, J., in *Capell* v. *Child*, and also the case of *Cooper* v. *Board of Works for the Wandsworth District*. His Lordship then proceeds as follows:

"Assuming the contention of the Crown to be correct, that in such a case as this it would be enough that the Commissioner should be satisfied of abandonment alone, residence being put out of the question, their Lordships would be disposed to say that there does not appear to have been a finding of the Commissioner of abandonment apart from non-residence. But they decide the case upon broader grounds. It appears to them that the defendant has not been heard in the sense in which a hearing has been used in the cases which have been quoted in many others, and in the sense required by the *elementary principles of natural justice*. The Commissioner doubtless acted with perfect good faith, but apparently without being aware that he was performing a judicial function, or even a function of a judicial nature. He has not stated upon what evidence he formed his opinion, whether written or *viva voce*, whether direct or hearsay. He refused to furnish the solicitor of the defendant with any note or memorandum of that evidence, to give him any information as to who the witnesses against his client were, or even what was the general character of their evidence. The defendant could not answer or explain testimony of which he was kept in ignorance, and therefore was not heard in his defence in any proper sense of that word."

In *Painter* v. *The Liverpool Oil Gas-Light Company*, 3 A. & E. 433, the principle under the discussion was applied. There a statute establishing a gas-light company enacted that if any person should neglect for a period of ten days after demand, to pay rent due from him to the company for gas supplied, the rent should be recoverable by warrant of a justice and execution thereon. A warrant issued by a justice without previously summoning and hearing the party to be distrained upon, was held to be illegal, though a summons and hearing were not in terms required by the Act. Williams, J., said: "*I never heard the proposition doubted, that a party is not to suffer in person or in purse without an opportunity of being heard.*" Denman, C.J., referred to Lord Kenyon's statement in *Harper* v. *Carr*, 7 T. R. 275, that: "*It is an essential rule in the administration of justice that no man shall be punished without being heard in his defence.*"

The same principle was applied by Jessel, M.R., in *Fisher* v. *Keane*, 11 Ch. D. 353, where the committee of a club had expelled a member of the club for alleged misconduct without giving him due notice of their intention to proceed against him and affording him an opportunity of defending or palliating his conduct. It was held that the committee was acting as a quasi-judicial tribunal and were bound to act according to the ordinary principles of justice; that notice of the investigation should have been given to the member and that the committee should be restrained by injunction from enforcing the resolution.

The last case was followed by Street, J., in *Gravel* v. *L'Union St. Thomas*, 24 O. R. 1. That learned Judge says: "It is one of

the fundamental principles of every judicial inquiry, whether conducted in a Court or by a body such as this, that a person accused shall not be condemned without a fair chance of hearing the evidence adduced against him and of being heard in his own defence.

The same principle was adopted in *Labouchere* v. *Wharncliffe*, 13 Ch. D. 346.

I would also refer to *Bonanza* v. *The King*, 40 S. C. R. 281, and especially to the judgment of Duff, J., and the cases referred to by him.

I have discussed the above principle almost at greater length than was needful, but have done so because it was strenuously urged that the Workmen's Compensation Act does not require the Commissioner to give notice to the employer in disposing of a claim, and that he was justified in the course followed in the present case. In order to justify the action of the Commissioner it must be shown that the legislature, as Parke, B., points out in *Bonnacher* v. *Evans*, has expressly or impliedly given an authority to act without notice. Turning to the Act, there is nothing which in terms dispenses with *notice to the employer of the time and place when the inquiry is to take place*, but there are many sections which to my mind clearly intimate that the employer should be notified.

The definitions of "employer" and "workman" in section 2 of the Act, show that it must be established that there was a contract of hiring between the employer and the workman, and the nature of the work in which the workman was engaged must be shown, so that the claim may be brought within the provisions of the Act. The employer should be permitted to show, if he can, that no contract of hiring existed between him and the workman.

Section 11 declares that no action shall lie for the recovery of the compensation, but all claims for compensation shall be heard and determined by the Board, without the intervention of counsel or solicitor on either side except with the express permission of the Board. This section shows that an adjudication between the parties is to take place, but there can be no proper adjudication without notice to the employer and without hearing what he has to say in his defence either personally or by his solicitor if he is permitted by the Board to employ a solicitor. The statement of the law by Lord Lyndhurst in *Capel* v. *Child*, and adopted by the Privy Council in *Smith* v. *Queen*, shows that there can be no proper adjudication of a case in the absence of the party who is to be charged.

Section 13 (2) of the Act is as follows:

"Any party to an action may apply to the Board for adjudication and determination of the question of the plaintiff's right to compensation under this part and (or) as to whether the action is one the right to bring which is taken away by this Part, and such adjudication and determination shall be final and conclusive." This necessarily implies that the party applying to the Board *must notify the opposite party that an application is being made to the Board to take away or suspend the right of action.* It is not necessary in this appeal to deal with the question of jurisdic-

tion which may arise under the clause. I can find no similar provision in the Ontario Act.

Section 18 makes it necessary that notice of the accident is to be given by the workman as soon as practicable and contains provisions as to how the notice is to be given. It is difficult to see what would be the object of *giving notice of the accident to the employer unless the latter was also to have notice of the inquiry before the Board.*

Section 19 (1) provides that a workman who claims compensation shall, if so required by his employer, submit himself for medical examination. This is evidently for the purpose of obtaining evidence as to the nature of the injury and of other facts for use on the inquiry.

Section 29 is as follows: "Where a claim for compensation is made, notice of every such claim shall be given to the insurance company or other underwriter liable and to the employer, and the Board shall determine the question of the right of the workman or dependent to compensation, and the amount of such compensation, subject to the provisions of this Part, and shall make an order as hereinafter provided." This section appears to me to show clearly that it was the intention of the Act that notice of the inquiry should be given to the employer.

Section 52: "The Board shall have the like powers as the Court of King's Bench in Manitoba or a Judge thereof for compelling the attendance of witnesses and of examining them under oath, and compelling the production of books, papers, documents and things."

In this connection, if the Commissioner or the Board exercises the power of calling and examining witnesses under oath, are these witnesses not to be subject to cross-examination, and is no evidence to be offered in contradiction of the evidence so adduced? Clearly it was the intention of the Act that the inquiry was to be conducted as a judicial inquiry at which the party to be charged had the right to be present and to be heard.

Section 57 (1) declares that the Board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions under this part. This shows that the inquiry by the Commissioner *is in the nature of a trial of an action.*

The inquiry held in this case by the Commissioner under the provisions of the statute was beyond doubt intended by the statute to be a judicial one. His duty therefore was to see that it was conducted as a judicial inquiry. The plaintiffs were entitled to notice of the proceedings before the Board leading up to the adjudication upon the claim, but they received no notice of the proceedings or of the adjudication and the order in question was made behind their backs. The words of Erle, C.J., in *Capell* v. *Child* are peculiarly applicable in this case: "Here," he says, "is a jurisdiction given . . . a new authority given . . . and according to every principle of law and equity such judgment could not be pronounced, or if pronounced, could not for a moment be sustained

unless the party in the first instance had the opportunity of being heard in his defence, which in this case he had not."

Section 58 authorizes the Board to award such sum as it may deem reasonable to the successful party to a *contested claim* for compensation or to any other contested matter, as compensation for his expenses of the contest. How, it may be asked, can a contested claim arise if the employer is not notified of the inquiry and it all takes place behind his back?

Turning to the order itself, the effect of which is given in the Commissioner's letter of 5th December, 1917, we find that the plaintiffs are ordered to pay the widow of the deceased $20 a month during her life and that her expectation of life was fixed at 25.38 years. Supposing that she lived up to the end of this period all the monthly payments to be made to her would amount in the aggregate to $6,091.20, and the order calls upon the plaintiffs to pay this actual sum of money into Court forthwith. The cash is to be paid at once to cover monthly payments extending over 25 years if the widow lives that long. One might expect that if she died during the period, the balance of the money would be returned to the plaintiffs. But the order says, no, the balance will be held by the Board to meet future claims against the plaintiffs. In the meantime the plaintiffs will have the satisfaction of knowing that the unpaid portion of the award will bear interest at the rate of 3½ per cent. per annum, which is to be added to the amount lying at their credit. It is worthy of remark that just about the time when the order was made the Dominion Government was selling long-term bonds at a rate which would realize for the investor 5.61 per cent. An investment therefore, of some $4,280 in which bonds would produce the necessary annual income to provide the payments to the widow and at the end of her life would leave for the plaintiffs their capital sum unimpaired. The order speaks for itself. It is needlessly oppressive in its terms regarding the security to be furnished. This makes it all the more necessary that the plaintiffs should have been present at the making of the order and should have been given an opportunity to protest against its terms.

As I have already mentioned, the order appealed from only gave leave to amend the statement of claim and did not grant an injunction. But the parties desired the opinion of this Court upon the legal objections raised and this involved a somewhat full discussion of the Act.

I do not express any opinion upon the finding of the Commissioner that the death of the deceased arose out of his employment by the plaintiffs. This is a question which should be decided on an inquiry at which the plaintiffs would be given an opportunity to be heard and to present their side of the question.

I think the plaintiffs were entitled to make the members of the Board party defendants to an action to restrain the Board from enforcing the order: See *Raleigh* v. *Goschen* (1898), 1 Ch. 73.

I might suggest that notwithstanding the provision of sec. 57 of the Act, the filing of the order in the Court of King's Bench

would have the effect of making it a judgment of that Court under section 60 of the Act and the result would be that such judgment would immediately come under the jurisdiction of that Court. The Court of King's Bench might in such case refuse to permit its process and proceedings to be made use of to enforce a judgment where no notice of the proceedings leading up to it had been given to the party against whom the judgment had been obtained. It may be said, why do not the plaintiffs wait until the order has been filed in the Court of King's Bench and then move to stay proceedings on the judgment? But the plaintiffs might very properly apprehend that unless they promptly took such steps as might be available to set aside or stay proceedings on the order, they might be charged with laches or acquiescence.

The Courts have nothing to do with the general policy of the Act, which is a matter for the Legislature. The intention of the Act is to afford protection and relief to a large and important class of persons, workmen and their families. It is the duty of the Court to interpret the Act and declare its meaning where it is properly brought before the Court for that purpose. The Court can only interfere where the powers given by the Act have been exceeded or where a fundamental principle inherent in the Act has been disregarded, so that a want of jurisdiction in its officers supervenes.

I think the appeal should be dismissed. At the same time, I would suggest that the Board might set aside the order under the powers given to it by section 57 (3), and that the inquiry might be heard again, notice being given to the plaintiffs to appear and a full opportunity being given to them to present their side of the case. The plaintiffs being a corporation, they cannot be present in person. Permission, therefore, should be given by the Board under section 11 for the plaintiffs to be represented by their solicitor at the inquiry. If this suggestion meets with the approval of both parties an order to the above effect might be made.

CAMERON, J.A.—With reference to legislation in this Province dealing with the subject of Employers' Liability and Workmen's Compensation, I might mention the Act respecting Compensation to Families of Persons Killed by Accident, our form of Lord Campbell's Act. This Act was passed in 1881 as ch. 25 of 44 Vic., and is now ch. 36 R. S. M. 1913. It is incidentally only that this Act deals with compensation to the families of deceased workmen. The only other enactment on the subject prior to "The Workmen's Compensation Acts," 10 Edw. 7, ch. 81, was to be found in "The Employers' Liability Act," as it is called in ch. 61 R. S. M. 1913, now repealed. This Act, as found in R. S. M. 1902, ch. 178, was called "The Workmen's Compensation for Injuries Act," and was so styled in its original form, 56 Vic. ch. 39. This statute was founded on and closely followed in terms the Imperial "Employers' Liability Act, 1880," which was passed, as is well known, to allay the dis-

satisfaction on the part of the public with the decisions of the Courts on the subject of common employment, decisions regarded as repugnant to good sense and sound reasoning.

These decisions were modified to some extent by the Act. "Under the Act a workman is *prima facie* entitled to recover where the employer—be he private employer or corporation—has delegated his duties or powers of superintendence to other persons, and such other persons have caused injury to the workmen by negligently performing the duties and powers delegated to them, but the doctrine of common employment, save in so far as it is thus abrogated, remains." Ruegg, Employers' Liability, p. 89. The restrictions on the amount which could be recovered in actions brought under these Acts have evoked continuous criticisms. It may be interesting to notice that the exclusion from the word "workmen" of the meaning "a labourer, domestic or menial servant in husbandry, gardening or fruit growing," as set out in sec. 2, sub-sec. (c) of our Act is not to be found in the English Act.

We now come to the Act of the Legislature, 10 Edw. VII., ch. 81 (ch. 209, R. S. M. 1913, now repealed), "The Workmen's Compensation Act, founded on the Imperial Act," entitled "The Workmen's Compensation Act, 1906." 6 Edw. VII., ch. 58, with which the Workmen's Compensation Act, 1897, of which it is an extension, must be considered. It was under this last mentioned Act that for the first time the employer was made liable to compensate his workmen for injuries quite apart from the question whether he, the employer, or anyone acting for him, was guilty of any breach of "duty in respect of the matter out of which the accident arose." The Act made the employer an insurer of his workmen against loss caused by injuries sustained by them when engaged on his work. Originally the Act applied only to a few of the leading industries, and the first great extension of its benefits was made in 1900 to workmen engaged in agriculture. *The partial application of these Acts was found to be unjustifiable*, and the Workmen's Compensation Act, 1906, in which the broad principle of universal insurance against industrial accidents was recognized and applied, was enacted. By this Act the Acts of 1897 and 1900 were repealed.

Under sec. 5 of the Act (ch. 209, R. S. M. 1913), the provisions of the Act apply only to employers employing five or more workmen and do not apply to domestic servants, nor, it need hardly be added, to the employment of agriculture. And by sec. 3, when an accident occurs in any employment to which the Act applies to a workman, the employer shall be liable to pay compensation as prescribed. In certain cases of injury, where personal negligence intervenes, the civil liability of the employer is preserved at the option of the workman. Section 2, sub-sec. 3. If the injury is due to drunkenness no compensation is recoverable; if an injury producing partial incapacity is due to the serious and wilful misconduct of the workman no compensation is recoverable; otherwise, however, if the result of such misconduct is total disability or death. (Sec. 4, sub-sec. 4.)

If any question arises as to liability (including the question whether the employment or the person injured is a workman within the Act), it is to be settled by agreement, or in default thereof by arbitration in accordance with the second schedule of the Act.

I think there is no difficulty in deducing from the terms of the Act the intention of the Legislature to discountenance appeals and references of the Courts in matters arising thereunder. The only right of appeal given by the Act is of a strictly limited kind and is to be found in sec. 4 of the second schedule, which is as follows:

"4. Any other Act of the Legislature of Manitoba referring to arbitration shall not apply to any arbitration under this Act; but a committee or an arbitrator may, if they or he think fit, submit any question of law for the decision of the judge of the County Court. and the decision of the judge on any question of law, either on such submission or in any case where he, himself, settles the matter under this Act, or where he gives any decision or makes any order under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by the statute governing appeals from the County Court either party appeals to the Court of Appeal. The Court shall, for the purpose of proceedings under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the proceedings were an action in the Court."

This (with some non-essential differences) is the same as sec. 4 of the second schedule of the Imperial Act, 1906, which is in turn taken from sec. 4 of the second schedule of the Act, 1897, except that the words "or where he gives any decision or makes any order under the Act," are inserted in the Act of 1906. As it is now, in England an appeal lies only from the decision of a County Court Judge on a question of law submitted to him by an arbitrator or from his decision on a question of law or a mixed question of fact and law where he himself acts as arbitrator. This appeal lies to the Court of Appeal, from which there is another appeal to the House of Lords.

I do not imagine that the framers of sec. 4 of the second schedule of the Act of 1897 (carried into the Act of 1906 and into our own Act, as above pointed out), had any other idea than that they were providing for an appeal where a question of law came incidentally before the County Court Judge for determination. That Parliament deliberately intended, by the words of sec. 4, to confer upon thte Court of Appeal the right to inquire into and determine the jurisdiction of the County Court Judge, I find it difficult to believe.

As a matter of fact, under the Acts of 1897 and 1906, there was no appeal whatever when the County Court Judge dealt with questions of fact. Nor under the Act of 1897 was there any appeal whatever from any decision of an arbitrator appointed by a County Court Judge. See *Gibson* v. *Wormald*, 6 W. C. C. 155, where it was sought to read into the section a right of appeal from the arbitrator. I quote the following from the judgment of Collins, M.R., in this case:

"A strong appeal was made to them by the learned counsel for the employers, which in effect asked them to take upon themselves the functions of the Legislature and to say that the case was a *casus omissus*, and that the Court ought to clothe the arbitrator with all the obligations and limitations of the County Court Judge. But it must be remembered that, when the Act was passed, in all probability none of the questions which had subsequently arisen were contemplated, and the scheme of the Act was that all questions under it should be settled by arbitration, the arbitrators being either a particular committee or an arbitrator agreed on by the parties, or an arbitrator appointed by the County Court Judge, or the County Court Judge himself. The general scheme of the Act was to have matters settled by arbitration, and *prima facie* the decision of the arbitrator would be final, and not subject to appeal. The Legislature thought that, as a general rule, they would deal with these disputes by what he might call a lay or a non-technical tribunal, and, therefore, he could understand the view of the Legislature that there should be no appeal. Then the Legislature, in dealing with the County Court Judge, gave an appeal from him; but with regard to the other arbitrators the Legislature only gave an appeal when the arbitrator thought fit to submit the question of law for the decision of the County Court Judge, perhaps in the hope that the judge's decision would be taken as final, and that an appeal to him would not involve the same expense as an appeal to this Court. Therefore, it was reasonable to suppose that the Legislature deliberately intended that no appeal should lie from the arbitrator except where he thought fit to submit any question of law for the decision of the County Court Judge."

I would call attention to the language of Lindley, L.J., in *Fenton* v. *Thorley*, 1903, A. C. 443, where he says: "But when personal injury and its cause or causes have been ascertained, the question whether such cause or causes *amount to an accident* within the meaning of the Act is a question of law on which the decision of the County Court Judge is not final and is not a question of fact on which his decision is not open to appeal." This has long been settled law, but it may well be considered that it states a question that Parliament, when the Act of 1897 was originally framed and passed, did not contemplate or intend should be made appealable and an open door to costly litigation. In any event the decision of an arbitrator on the point of jurisdiction is not open to appeal. That is absolutely clear, but from all decisions of the County Court Judge on what constitutes an accident, an appeal lies, as held in *Fenton* v. *Thorley*, and in other cases.

The result of the liberal interpretations given by the Courts to section 4 of the second schedule is to be found in the flood of reported cases in England. Special sets of reports have been brought out to include the decisions in appeal under the Act. While the maximum of compensation under the Act is fixed at £300 in case of death and much less in the case of injuries not resulting in death, yet there have been not only a great number of appeals to the Court of Appeal but a large number of these have been carried

to the House of Lords. Some of these decisions have involved considerations not easily intelligible, and some of them have been based on the narrowest possible distinctions. The difficulty in reconciling them has been commented on by text writers. Lord Robertson remarked in *Fenton* v. *Thorley* (p. 452), "Much poring over the word 'accident' by learned counsel has evolved some subtle reasoning about these sections. I confess that the *arguments seem to me to be entirely over the heads of Parliament, of employers and of workmen.*" It can be said without disrespect that this "subtle reasoning" has not been confined to counsel.

I observe that in 1917, A. C., there were no less than five appeals before the House of Lords arising out of the Workmen's Compensation Act. In Part I. of the 1918 A. C. there are not less than three appeals under the Act. In one of them, *Great Western Ry. Co.* v. *Helps*, 1918, A. C. 141, it was held by the House of Lords that for the purpose of assessing compensation under the Act to a railway porter who has "sustained injuries, gratuities or 'tips' received by him from passengers whom he has 'assisted' in the execution of his duties, where the practice of giving and receiving tips is open and notorious and is sanctioned by the railway company, are included in his 'earnings.' It is to be observed that Lord Passmoor issued a warning that 'the decision in this case is applicable to tips which are notorious and well known, and not to tips which are casual, sporadic and trivial in amount.'"

We have it therefore firmly settled that, under the Workmen's Compensation Act, R. S. M. 1913, ch. 209, there was no appeal from an arbitrator on a question of law or fact. If the arbitrator thought fit he might submit a question of law for the decision of the County Court Judge, which would be appealable to the Court of Appeal. Otherwise the decision of the arbitrator was unassailable and so also was the decision of the County Court Judge, except on a question of law or mixed question of law and fact.

And now we come to the Act in question in this appeal, the Workmen's Compensation Act, ch. 125, 6 Geo. V., by which chs. 61 and 209 R. S. M. 1913, are both repealed and a new method of determining compensation to workmen for injuries sustained in their employment is provided.

By sec. 3, "Where in any employment to which this Part applies, personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall be liable to provide or to pay compensation in the manner and to the extent mentioned."

By sec. 46 of the Act "There is hereby constituted a commission for the administration of this Act to be called 'The Workmen's Compensation Board,' which shall consist of a commissioner to be appointed by the Lieutenant-Governor-in-Council, and shall be a body corporate." By subsequent amendment two members have been added to the Board.

The Board is given wide powers, and by sec. 62 has the like powers of the Court of King's Bench for compelling the attendance of witnesses, etc.

The section of importance on this appeal is sec. 57, which is as follows:

"57 (1) the Board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect of which any power, authority, or discretion is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any Court, and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any Court or be removable by *certiorari* or otherwise into any Court.

"(2) Without thereby limiting the generality of the provisions of sub-section (1) it is declared that such exclusive jurisdiction shall extend to determine—

"(a) Whether any industry or any part, branch or department of any industry falls within the provisions of this Part;

"(b) Whether any part of any such industry constitutes a part, branch or department of an industry within the meaning of this Act.

"(3) Nothing in sub-section (1) shall prevent the Board from reconsidering any matter which has been dealt with by it or from rescinding, altering or amending any decision or order previously made, all of which the Board shall have authority to do."

Other sections of importance are secs. 58, 59 and 60.

Now it is to be observed that there is in this present Act no right of appeal from the decision of the Board, not even such a limited right as was conferred by sec. 4 of the second schedule of the former Workmen's Compensation Act repealed by this Act. Not only is there no such provision, but we have the express and explicit provision of sec. 57 forbidding any appeal to the Courts from or interference by the Courts with, the actions and decisions of the Board, in language that is incapable of being made more effective. There is no question in my mind that this is precisely what the Legislature intended. It wished to eliminate the expenses and delays consequent on the everlasting series of appeals which had gone far, in the minds of many, to make the administration of the old law a scandal, and, for that purpose, to give the administration of the Act to a non-technical and business Board clothed with absolute powers and responsible to the Government and Legislature only. That this is the legitimate conclusion to be drawn from the history of the legislation and from a consideration of the defects found in the administration of the original enactments, is, in my judgment, beyond question.

As stated by Collins, M.R., in the passage above cited, "The Legislature thought that, as a general rule, they would deal with these disputes by what might be called a lay or non-technical tribunal, and therefore he could understand the view of the Legislature that there should be no appeal." These remarks, applicable to an arbitrator under the English Act of 1897, are most applicable to the Board under our Act. It is a lay and non-technical tribunal

and it was the intention, wish and direction of the Legislature, that it, and it alone, should deal finally and absolutely with matters coming before it. Therefore, the jurisdiction of the Courts to review or interfere with its orders and proceeding is definitely and positively excluded. All this seems absolutely clear to me. To adopt the argument of the plaintiff means to my mind, that this Court must repeal sec. 57 of the Act and read into the Act in lieu thereof, not the old section 4 of the second schedule, for that would be insufficient, but a general right to appeal or to interfere by injunction or prohibition, which is the same thing. All orders and decisions of the Board, whether in establishing its jurisdiction (which is cerwtainly a question arising under the first part), in the first instance or after, and whether made *ex parte* or not, are in my judgment unassailable and unimpeachable, save as they may be reconsidered by the Board or be dealt with by the Legislature. It is true there may be an occasional hardship in working out the Act, but possibly there can be no greater abuses than flourishing under former legislation. There is no doubt in my mind that in the scheme of the Act it was intended, as it was declared, that there should be no appeal to the Courts and no interference by the Courts with the decisions of the Board.

Cases which were cited to us, such as *Bonanza* v. *King*, 40 S. C. R. 287, and other cases of like tenor, to my mind, have, in view of the evident intention of the Legislature, of the history of the legislation in question, and the clear unequivocal language used by it in expressing its intention, no application whatever.

As to the question of parties: It was said by Romer, J., in *Raleigh* v. *Goschen*, 1898, 1 Ch. p. 80 (an action against the Lords-Commissioners of the Admiralty), "The conclusion I come to is that the present action was intended to be, and is, a claim against the defendants in their official capacity and not as individuals." I think those words are applicable here. This action is undoubtedly directed against the Board and not against the individual members of the Board, who are not necessary or proper parties."

In my view, the statement of claim discloses no cause of action and should be dismissed.

LOCAL AND PERSONAL.

Senator George G. Foster, K.C., has been unanimously elected batonnier of the Montreal Bar in succession to Aimé Geoffrion, K.C. The Montreal Junior Bar Association have elected as president, Henri Gerin Lajoie. The Quebec Bar has elected Ferdinand Roy as batonnier.

There does not seem any likelihood of a shortage in lawyers. Seventy passed the last Ontario Bar Examination, a returned soldier carrying off the highest honours. The Osgoode Law School began a summer session on May 15th for the exclusive benefit of fifty returned men. The profession is active in the other provinces also. We note that seventy-six law students have been writing examinations in Saskatchewan.

R. Hunter, who formerly practised in Wainwright, and went overseas with the 49th Battalion, has resumed practice in Irma, Alta.

The Vancouver Bar has shown what, in diplomacy, is called "Territorial disinterestedness," passing a resolution that barristers who gave up their practice on going to the front, are entitled to have their clients return to them.

Cecil Rutherford, son of Hon. Dr. A. C. Rutherford, having returned from overseas, has been admitted to the Bar, and will practise with the firm of Rutherford, Jamieson & Grant, of Edmonton. Another Edmonton recruit to the Bar, was Stanley McCuaig, who won a commission in the field with a battery.

Capt. Henry Ward, M.C., who had a lively time with a Machine Gun Section, has resumed practice with Mackenzie, Thom & Co., of Regina.

OBITUARY.

The County Judiciary has recently lost two well known and greatly esteemed members: Judge John O. Dromgole, Senior Judge of Essex County, and Judge John Winchester, Senior Judge of York County.

Hon. Sir Auguste R. Angers, K.C., of Montreal, died on April 15th. He had held the offices of Attorney-General (in the De Boucherville administration), Lieut.-Governor of Quebec, member of the Thompson administration with a seat in the Senate.

Mr. Daniel S. Kendall, Chief Editorial writer of the New York Commercial, is dead. He practised law for several years in Woodstock, Ont.

Mr. George Ross, at one time of Toronto, but late town solicitor of Cobalt, is dead.

Mr. Harper M. Armstrong, well known in Toronto legal circles, died on May 15th. He had long been connected with the old Beatty firm.

Mr. Moise Longtain, one of the oldest notaries in Canada, is dead. He commenced practice in 1859, and practised for 50 years in an office on Notre Dame St., Montreal.

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A MARRIAGE ANOMALY.

By His Honour Judge Swanson.

Mr. Justice Astbury has just decided the interesting point whether under the English law the marriage of a man with his deceased wife's niece, that is the daughter of his deceased wife's brother, is lawful, in the negative. Notwithstanding the Marriage Act, ch. 105 of the Revised Statutes of Canada, 1906, this decision correctly sets forth the present law in Canada. The Canadian Act is comprised within a few lines. Section 1 gives the Act its name, "The Marriage Act," and sec. 2 says: "A marriage is not invalid merely because the woman is a sister of a deceased wife of the man, or a daughter of a sister of a deceased wife of the man." Section 2 has a very mild apologetic look to it, as if the Canadian Parliament were a little fearful about coming out in the open and declaring bluntly as the English Act does that a past or a future marriage of a man with his deceased wife's sister is validated. The Canadian Legislature has always stepped very softly on the glass-strewn dyke of the marriage law. In its haste in dealing with a vexed question impugning the Levitical law a "*casus omissus*" has occurred. No provision has been made to validate the marriage of a man with the daughter of a brother of his deceased wife, nor of a woman with her deceased husband's brother. The latter omission should stimulate the activities of the Women's organizations of the

day to see that woman's rights are not unduly invaded by man. There can be no logical reason for denying to woman the same rights and privileges as men possess of doing right (or wrong) as the case may be.

Marriage of a man with the daughter of his deceased wife's brother, or with his deceased wife's sister are within the prohibited degrees set forth in Archbishop Parker's table of affinity, published in 1563, which was made part of the Canon Law by Canon 99 of the year 1603. By the Statute of Precontracts (the unrepealed portion of 32 Henry VIII., ch. 38) which incorporated the prohibited degree set out in 28 Henry VIII., ch. 7, and of the 99th Canon, the table compiled by Archbishop Parker is a portion of the Statute law of the Realm, and binding on both Clergy and laity. See the decision of the Privy Council in *Sherwood* v. *Bay*,[1] also of the House of Lords in *Brook* v. *Brook*.[2] Vice-Chancellor Esten held in *Hodgins* v. *McNeil*[3] that the statutes, the English Marriage Act, George II., ch. 33 (Lord Hardwicke's Act), 28 Henry VIII., ch. 7, also 32 Henry VIII., ch. 38, so far as they remained in force, and so much of the Canon law as had been adopted by the law of England, was introduced into Ontario (Upper Canada) by virtue of the Act 32 George III., ch. 1 (the Constitutional Act). See also judgment of Sir John Beverley Robinson, C.J., in *Reg.* v. *Roblin*,[4] also judgment of Chief Justice Armour, C.J.O., in *O'Connor* v. *Kennedy*.[5]

Archbishop Parker's table is inserted in the Book of Common Prayer.

For the benefit of those brothers of our profession who read their Halsbury more diligently than their Prayer Book, I might add that this table is set forth in Halsbury, vol. 16, pp. 283, 284, in foot-note "G." The text writer states at the conclusion of this foot-note:

[1] 1 Moore P. C. 353.
[2] 9 H. of L. 193.
[3] 9 Grant, at p. 309.
[4] 21 U. C. Q. B. at p. 355.
[5] 15 O. R. at p. 22.

"It may be noted that marriage with the daughter of a deceased wife has not been legalized, nor has marriage with a deceased husband's brother." The first of the above propositions has now been decided by Mr. Justice Astbury. The report of the learned judge is just to hand and is found, 1919, vol. 1 Chancery, page 128. It was argued with a good deal of reason from the merely ethical, if not the purely legal, point of view that by the Deceased Wife's Sister's Marriage Act of 1907, a deceased wife's sister is removed from the prohibited degrees, and "a *fortiori*" her sister's daughter, who is one degree further off, is removed by implication, that it cannot have been intended to make a wife's sister marriageable, and leave her daughter unmarriageable, and that by parity of reason a wife's brother's daughter, being in the same degree as her sister's daughter, is now marriageable. Astbury, J., however, refused to accede to this argument. He held that the Act of 1907 did not alter the prohibited degrees generally. It merely removed one of them. In the present case the marriage was not by a widower with his deceased wife's sister's daughter, but with her *brother's* daughter, and as he was unable to find anything in the 1907 Act to validate such a marriage he therefore held it was void. In this he followed *Reg.* v. *Brighton Inhabitants*,[6] in which it was held that the marriage of a man with his deceased wife's half-sister's daughter was null and void (not voidable) by the Marriage Act, 1835, Lord Chief Justice Sir Alexander Cockburn stating: "It is a case which depends upon the question whether a marriage with the niece of a deceased wife is or is not valid; and I now state, as the united opinion of the Court, that such a marriage is not lawful. In *Ellerton* v. *Gastrell*,[7] the Court was of the opinion that a marriage with the daughter of a wife's sister was within the degrees prohibited by the Levitical law. Then we have the Marriage Act, 1835, which by sec. 2 enacts:

[6] 1 B. & S. 447. 458.
[7] 1 Com. 318.

"that all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be (not merely voidable but) absolutely null and void to all intents and purposes whatever." We must consider that Act to have been passed with reference to the known and ascertained state of the law in the Ecclesiastical Courts, and as laid down by the Court in *Ellerton* v. *Gastrell*, and consequently we have that law sanctioned and confirmed by an Act of Parliament. The result is that the Marriage Act (Canada), ch. 105, does not, to adopt the language of Mr. Justice Astbury, "alter the prohibited degrees generally." It merely removes two of them. In other words a marriage of a widower with the daughter of his deceased wife's brother is still null and void in Canada, as is also the marriage of a widow with her deceased husband's brother. We all know that the difficulties which stand in the way of modernizing the law in these matters in Canada are largely due to the religious scruples of a large body of our people. We must respect the sincere views of all classes of our people, and not needlessly fly in the face of them. However, with all due respect to such views it does seem to me that it is surely time for Parliament to seriously grapple with these grave problems, which must perforce include the question of the establishment by parliament of Divorce Courts for the different provinces. The B. N. A. Act apportions to the Dominion legislation on "Marriage and Divorce," under sec. 91, sub-sec. 26, reserving to the provinces only the matter of "Solemnization of Marriage," under sec. 92, sub-sec. 12. Since this article has been in course of preparation I have just read in the daily press that a member of our profession, Mr. W. F. Nickle, K.C., who holds a seat in the House of Commons for Kingston, has given notice of the introduction of a Bill dealing with the creation of Divorce Courts in Canada. This measure is, I think, a timely one, which should receive the serious consideration of not only the House

but of the public at large, and in particular of members of the legal profession, who will have to do so largely with the conduct of business before these Courts if established. It is not likely that such a bill can go through a mixed Assembly such as the Parliament of Canada, representative of different races and creeds, without some preliminary educational work.

The introduction of such a Bill will naturally focus the serious attention of the people at large upon it, and no doubt due time will be given for careful attention and study of the question in all its phases. It certainly looks like an anachronism for a province like British Columbia, comprising a population which we fondly believe to be an up-to-date body of people thinking along the most modern of lines, to have to invoke the English statute law passed by the Imperial Parliament in 1857 (Divorce and Matrimonial Causes Act) as the law governing this subject in force to-day in B.C.[8]

This Act, sec. 8, says that the Lord Chancellor, the Lord Chief Justice of the Court of Q.B., the Lord C. J. of the Court of Common Pleas, the Lord Chief Baron of the Court of Exchequer, the senor puisne judge in each of the three mentioned Courts, and the judge of Her Majesty's Court of Probate shall be the judges of the said Court, that is the Court for Divorce and Matrimonial Causes constituted by this Act. Section 12.—The Court shall hold its sittings at such place or places in *London* or Middlesex or elsewhere as Her Majesty in Council shall from time to time appoint. Section 13.—The Lord Chancellor shall direct a seal for the Court, etc., etc., to be made. Section 55.—Appeal from the Judge Ordinary is provided for to the Full Court, and sec. 56 provides for an appeal to the *House of Lords,* etc., etc. One can therefore understand that such a well-known constitutional lawyer as Mr. Justice Clement should use the following language

[8] It is true, however, that the *procedure* in divorce matters in B.C. is now regulated by "Divorce Rules" promulgated by the judges of the Supreme Court of B.C.

in dealing with the question of jurisdiction in divorce assumed under this Act by the Supreme Court of British Columbia in *Watt* v. *Watt*[9]: "In short I am of the opinion that the law enacted by the Divorce and Matrimonial Causes Act of 1857, was from local circumstances *wholly incapable of application to British Columbia,* and I cannot bring myself to hold that the establishment by colonial enactment couched in general terms, of what I may call an ordinary Court with general jurisdiction throughout the colony, was intended or would suffice to make it an extraordinary Court with the extraordinary, almost revolutionary, jurisdiction of the lately created English Divorce Court." It is to be remembered too that Mr. Justice Clement's judgment in this case, holding that the Supreme Court of British Columbia did not possess jurisdiction to grant divorce *"a vinculo matrimonii"* was given in face of the fact that the Court had with some exceptions been exercising such jurisdiction for *over thirty years* at that time. Later on in *Sheppard* v. *Sheppard,*[10] Mr. Justice Martin in a most learned and elaborate judgment, expressed his difference with Mr. Justice Clement's judgment, and held that the Court rightly possessed such jurisdiction in divorce. The case of *Watt* v. *Watt* went to the Privy Council, the case being reported in 77 L. J. P. C. 123. The Privy Council reversed Mr. Justice Clement, and thus stabilized the law of British Columbia. This English Act was held to have become the law of this Colony under the proclamation of Sir James Douglas, Governor of the mainland of British Columbia, dated November 9th, 1858, which introduced the laws of England of that date as the law of the Colony, so far as they were not from local circumstances inapplicable. The English Act has been made more workable and complete from year to year, and more to fit modern conditions of life, but with such amendments to the English Act we have nothing legislatively to do. Our law on the subject is

[9] (1907) 13 B. C. R. at page 9.
[10] (1908) 13 B. C. R. 486.

made like the laws of the Medes and Persians, incapable of change until, of course, the only Legislature now competent to deal with the whole situation, viz., the Parliament of Canada, see fit to bestir itself to action and deal constructively with the whole matter. I understand that the powers of the Supreme Courts of Alberta and Saskatchewan, and I think of the Court of King's Bench, as the Supreme Court of Manitoba is called, to exercise jurisdiction in divorce under this round-about Imperial enactment (which British Columbia at an early date took a bold chance at), are now finally to be the subject of adjudication before the Privy Council. This is a sort of belated thought as far as the prairie people are concerned, as Mr. Justice Clement said in his judgment in the above case at page 291 (his decision was given in the year 1907), "no attempt has ever been made, as far as I know, to invoke the aid of the Courts in Manitoba or the North-West Territories along this line, notwithstanding the fact that the law of England as it stood in 1870, was introduced there in terms almost identical with those of Sir James Douglas' proclamation."

It is true there were some sporadic opinions expressed by North-West lawyers in a very tentative way, that their Courts did possess such jurisdiction, articles appearing to that effect in the columns of the CANADIAN LAW TIMES within the past fifteen years, if my memory serves me aright. But until the Privy Council decision in the British Columbia case the matter was never apparently taken very seriously by the profession there. It would appear that there should now be little doubt as to the decision of the Privy Council in such cases after their decision in the British Columbia case, and keeping in mind the above language of Mr. Justice Clement.

All this uncertainty, anxiety, and very large expense extending over so many years have been in large measure occasioned by the extreme reluctance of the Federal Parliament to grapple with and clarify the

whole situation. It is to be hoped that Mr. Nickle will not be a voice crying in the wilderness. It may be that Canada requires another Mr. Justice Maule on our Bench to expedite the reform of our laws in this regard. It is said that the enactment of the English Matrimonial and Divorce Causes Act of 1857, was very materially hastened by the biting irony of that great Judge on the trial of a poor man, a hawker, at the Warwick Assizes on the charge of bigamy. The anecdote is set out in Croake James' well-known little book "Curiosities of Law and Lawyers," at page 317. It is also quoted at length by Mr. Justice Martin in his judgment above quoted at page 515: Mr. Justice Martin takes the anecdote from Nash's "Life of Lord Westbury," page 210. I am giving the following quotation from Mr. Justice Martin's judgment, p. 515:—

"Next came the great question of divorce. More than one commission had reported in favour of establishing a separate Court so that the dissolution of marriage might be effected by judicial decision instead of by a special Act of Parliament. By this change the expense incident to the existing procedure would be materially reduced and the remedy which lay within the reach of the wealthy would be extended to the poor. As the law, or rather practice, stood, the privilege of obtaining a release from the marriage tie depended on a mere property qualification; if a man had £1,000 to spend he might rid himself of an unfaithful wife, if not he must remain her husband.

"The well-known anecdote of Mr. Justice Maule gives a forcible illustration of the process under the old law, and is such an excellent specimen of judicial irony that it must not be omitted here. A hawker who had been convicted of bigamy urged in extenuation that his lawful wife had left her home and children to live with another man, that he had never since seen her, and that he married the second wife in consequence of the desertion of the first. The Judge in passing sentence addressed the prisoner somewhat as follows:

'I will tell you what you ought to have done under the circumstances, and if you say you did not know, I must tell you that the law conclusively concludes that you did. You should have instructed your attorney to bring an action against the seducer of your wife for damages; that would have cost you about £100. Having proceeded thus far, you should have employed a proctor and instituted a suit in the Ecclesiastical Courts for a divorce, *'a mensa et thoro'*; that would have cost you £200 or £300 more. When you had obtained a divorce *'a mensa et thoro'* you had ONLY to obtain a private Act for a divorce *'a vinculo matrimonii.'* The bill might possibly have been opposed in all its stages in both Houses of Parliament, and altogether these proceedings would have cost you £1,000. You will probably tell me that you never had a tenth of that sum, but that makes no difference. *Sitting here as an English Judge it is my duty to tell you that this is* NOT *a country in which* THERE IS ONE LAW FOR THE RICH AND ANOTHER FOR THE POOR.

"The sentence of the Court is that you be imprisoned for ONE DAY (the learned Judge is also reported to have added 'and as *that day* was yesterday, prisoner, you may now go').

"These observations exposing the absurdity of the existing law attracted much public attention, and probably did more than anything else to prove the need of reform."

JOHN DONALD SWANSON.

Kamloops, B.C.
April 26th, 1919.

BY THE WAY.

THE NEGLECTED STUDY OF OUR CONSTITUTION.

It is the privilege of the Bolshevist alone to ignore Constitutional limitations. He is the rough-and-tumble fighter of legislation, and kicks below the belt defined by the British North America Act, or whatever constitution has been in force in the country where he moves, kills, steals and has his being. He frankly disregards all law, and substitutes his own will or whim. Any precedents other than those of Robespierre or Lenine do not interest him. His justice is that of Jedburgh, and his one principle of administration is that all persons or classes which have had any share in the art and practice of government in the past, shall on pain of death cease to be heard.

The rest of us profess to stand for law, order and constitutional government. Nevertheless we feed Bolshevism by our palpable and painful ignorance of the main principles of our sacred and neglected system of government. There is not a day when some public meeting or some editor or some deputation does not call loudly for action by a Provincial Premier in matters which belong to the Dominion, or action by the Government at Ottawa in matters which belong to the Provinces. Wanted a school-master who will teach the mere kindergarten and primary stuff as to where the unrestful public should apply for relief. Why not instruct the public that no Soviet can have wider powers over property than has a Provincial Legislature, of which one Judge was heard to observe, "the commandment 'thou shalt not steal' was not written of a Provincial Legislature"? A Mill's bomb can blow the equity of redemption out of a house, but the Legislature can blow away the first and second mortgages on that house; which is beyond the powers of a Mill's

bomb. Let the unrestful exhaust themselves in working towards the control of this powerful machinery. We can trust the drag of responsibility (which overtakes, sobers and steadies even the most radical of agitators when in office) to prevent more than a reasonable amount of foolishness.

The Much Misunderstood Riot Act.

There is a quaint superstition in the mind of the average mayor or other magistrate that it is a fearful thing — equivalent to proclaiming a dictatorship or wading through slaughter to a throne of blood—to read the Riot Act. These officials seem to link up this simple statutory precaution with pictures of armed soldiery shooting down the populace. Accordingly the magistrate resolutely refuses to read the Riot Act either to the disorderly crowd for their safety or to himself for the purpose of information as to its object and effect.

The result is that instead of a slight draught of preventive medicine there has to be an operation. We have scenes such as those in this little item from the press, relating to the streets of Winnipeg:—

"As the afternoon wore on, and the crowd became more riotous, many ugly surges were made. A mountie would be separated from his comrades and immediately he was fighting with brickbats coming at him from every direction. Toward him thousands would rush. Then at some other point in the huge intersection a special foot constable or several of them would get into trouble and a surge in that direction would take place. None of the bystanders could tell that the next rush would not be in his direction. Yet they stayed where they stood. Women, children, girls and elderly people, with military officers in uniform talking nonchalantly to one another, and women with children deliberately walked to the danger corner, in spite of the repeated warnings.

Women are Victims.

"In one surge, a woman with a baby carriage was caught. The perambulator was crushed to pieces, but the babe was rescued. 'Mounties' dashed pell mell down the sidewalks, wielding their clubs furiously and when they had passed a woman lay on the

sidewalk. She was carried away, but whether in a faint or badly hurt could not be said."

The Riot Act is embodied in R. S. C. c. 146. Note the following sections:—

91. "It is the duty of every sheriff, deputy sheriff, mayor or other head officer, and justice, of any county, city or town, who has notice that there are within his jurisdiction persons to the number of twelve or more unlawfully, riotously and tumultuously assembled together to the disturbance of the public peace, to resort to the place where such unlawful, riotous and tumultuous assembly is, and among the rioters, or as near to them as he can safely come, with a loud voice to command or cause to be commanded silence, and after that openly and with loud voice to make or cause to be made a proclamation in these words or to the like effect:—

"'Our Sovereign Lord the King charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful business, upon the pain of being guilty of an offence on conviction of which they may be sentenced to imprisonment for life.

"'God Save the King.'"

92. "All persons are guilty of an indictable offence and liable to imprisonment for life who,—

"(a) with force and arms wilfully oppose, hinder or hurt any person who begins or is about to make the said proclamation, whereby such proclamation is not made; or,

"(b) continue together to the number of twelve for thirty minutes after such proclamation has been made, or if they know that its making was hindered as aforesaid, within thirty minutes after such hindrance. 55-56 V. c. 29, s. 83."

93. "If the persons so unlawfully, riotously and tumultuously assembled together, or twelve or more of them, continue together and do not disperse themselves, for the space of thirty minutes after the proclamation is made or after such hindrance as aforesaid, it is the duty of every such sheriff, justice and other officer, and of all persons required by them to assist, to cause such persons to be apprehended and carried before a justice.

"2. If any of the persons so assembled are killed or hurt in the apprehension of such persons or in the endeavour to apprehend or disperse them, by reason of their resistance, every person ordering them to be apprehended or dispersed, and every person executing such orders, are indemnified against all proceedings of every kind in respect thereof.

"3. Nothing in this section contained shall, in any way, limit or affect any duties or powers imposed or given by this Act as to the suppression of riots before or after the making of the said proclamation. 55-56 V. c. 29, s. 84.

94. "Every sheriff, deputy sheriff, mayor or other head officer, justice, or other magistrate, or other peace officer, of any county,

city, town, or district, who has notice that there is a riot within his jurisdiction, who, without reasonable excuse, omits to do his duty in suppressing such riot, is guilty of an indictable offence and liable to two years' imprisonment. 55-56 V. c. 29, s. 84."

Observe the following particulars:—

1. "It is the *duty* of every . . . Mayor" not to cultivate popularity when 12 or more are "unlawfully, riotously and tumultuously assembled," but to have the Proclamation (generally known as the "Riot Act") made

Openly and with Loud Voice.

2. This gives the "women, children, girls and elderly people" and the inevitable fool person with a baby carriage, thirty minutes to get out and leave the street to the deliberately riotous.

3. If even on one occasion a popularity-seeking mayor got the two years mentioned in sec. 94 for omitting to do his duty, there would be few riots go the length of broken heads.

The strength of a riot is not in the men who incite it. These are usually few, furtive and cowardly. Its strength lies in the numerical bulk and momentum of the inquisitive spectators who gather out of curiosity, have their sympathies played on by seditious incitement, and on being jostled and pushed about have their animal pugnacity aroused.

The Loud Voice of a responsible magistrate applied early, by eliminating the merely curious, will expose the naked feebleness of the malicious few and cause them to shrink out of sight.

With reference to those egregious "military officers in uniform talking nonchalantly to one another," it is time that some senior officer talked in an anti-nonchalant fashion to these uniformed ignoramuses. The first duty of any person in uniform——except he be on provost duty—when a riot among civilians develops, is to "beat it." We commend to these and other military people the evidence of Lord Haldane, printed

in the Manual of Military Law, at p. 226, and particularly the following sentence:—

> "The soldier is a person who is different from an ordinary citizen in this, that he is armed with a deadly weapon, and, moreover, he comes out in a military formation. The result is that if he appears unnecessarily he is apt to create an impression in the minds of those who are about of a hostile character. His very menacing appearance may lead to the very thing which it is his purpose to prevent—disturbance. For that reason, in the War Office, we are very averse to allowing the military to be employed. We are compelled to do it; we have no choice; we have to obey the law; but we always tend to insist—and while I am there we always shall insist very strongly—on this, that we are called out legally and not illegally."

The only correct rule for the soldier in riotous times is that of the virtuous woman—be publicly conspicuous as little as possible.

THE HOMESTEAD AND EXEMPTED PROPERTY IN SASKATCHEWAN.

Creditors' Rights.

By Bram Thompson, M.A., Barrister-at-law.

The right of a creditor to be paid out of his debtor's estate is fundamental in British Jurisprudence. It is a radical principle of justice to which both law and equity have given their sanction. Any derogation from this right must be effected by Statutory Enactment and it is the object of this article to discuss: How and in what manner and to what extent this right has been invaded, weakened or reversed in Saskatchewan.

A decision of Mr. Justice Taylor reported in "Western Weekly Reports" of the 19th of October, 1918, at page 310, has forced the problem forward as one that demands investigation and solution. I revert to this decision later on.

The statutes affecting the question are:—

(1) The Exemptions Act, R. S. S. 1909, c. 47;

(2) The Homestead Act, 1915, c. 29.

(3) The Devolution of Estates Act, R. S. S. 1909, c. 43.

Section 2 of the Exemptions Act declares that—Certain real and personal property of an Execution debtor and his family is "free from seizure by all writs of execution;" and

Section 5 of the same Act says that in case of the death of an Execution Debtor "his property exempt from seizure shall be exempt from seizure under execution against his personal representative *if* the said property is in the use and enjoyment of the widow and children . . . of the deceased, *and* is necessary for their maintenance and support."

Section 2 of the Homestead Act requires the consent of the wife of an owner to any transfer or encumbrance of a homestead; and

Section 8 of the same Act declares that on the death of an owner, the homestead vests in his personal representative subject to section 5 of the Exemptions Act above set out, and makes the personal representative the owner and the widow his wife, for the purpose of the Act.

We have to consider and keep rigidly apart the right of the creditor; the right of the owner during his life; and the right of the representative after his death.

The Homestead Act, it is plain, does not affect the creditor at all except through the Exemptions Act.

The Exemptions Act is designed to protect a limited class of property while in possession of the owner, against a class of Creditor—a Creditor with an execution. The Act does not destroy the creditor's debt or relieve the exempted property from liability for it; and it does not disturb any existent right between debtor and creditor, except that it restrains, and only restrains, the Creditor from exercising a right to seize under an execution the property exempted—that is, the precise and identical property to which by designation and description the protection is extended. And this restraint, after the owner's death, is continued in the interest of the personal representative upon conditions which I deal with later.

It is important here to observe that neither the Exemptions Act nor the Homestead Act creates or vests in the widow or children of the Owner any estate or proprietary interest, nor even a right of occupation, in the exempted property. Neither of the Acts invades the owner's right; and during his life he can sell or dispose of the exempted property as he thinks fit, except that in disposing of the homestead by Deed, it requires the consent of the wife. I deal with this Consent later.

By his will the Owner, regardless of the Acts, can dispose of all the exempted property, including the Homestead without any consent, and to the complete exclusion of both wife and children. If he does so the wife and children cannot hold the Homestead or exempted property against the devisee.

When the Owner dies all his property, including the Homestead devolves under the Devolution of Estates Act, upon his personal representative charged with the debts, but upon a trust imposed by law if there is no will, to realize it by sale and apply the proceeds.

(1) In payment of the debts.

(2) In distributing the surplus among the next of kin.

This is, a Trust for both creditors and beneficiaries.

Subject only to this Trust, the *dominium* of the intestate Owner is transmitted in its integrity and fulness to the personal representative.

The representative cannot only sell as the owner could have sold, but he is under an imperative Trust obligation to sell, and he can be forced to sell by any *cestui que trust*—creditor or next-of-kin.

He can make no compact with one *cestui que trust* to the detriment of another, either by way of postponing the realization of the estate or otherwise evading the trust obligation imposed on him. In stating this I am assuming there is no will. The Will is the word of the owner. In the absence of a will the *ne-plus-ultra* word is the law.

The Law is what I have stated it to be—the obligation of the administrator to realize; the right of the creditor to be paid his debt; and the right of the next of kin to the surplus.

Now we come back to the conditions of section 5 of the Exemptions Act.

A monstrous claim has been put forward, and throughout Saskatchewan it has been acted upon for years,—that these conditions, which merely restrain

the seizure of the exempted property under an execution, transform the property itself into the property of the widow and children; and that the personal representative has no control over it or right in it, except as representing them.

Judge Taylor recently in the case referred to has, in a considered judgment, given effect to this doctrine.

With every respect to the learned judge and the vast array of legal opinion which he reflects, I demur and join issue.

The conditions of section 5 of the Exemptions Act that a creditor cannot seize exempted property under the execution—

(*a*) If it is in the use and enjoyment of the widow and children, and—

(*b*) If it is necessary for their support,

have manifestly nothing to do with the ownership of the property, or the representative's trust obligation, or the rights of creditors to be paid under an administration.

These clauses are no doubt a triangular tangle; but they are capable of legal uncoiling.

They are not made either to destroy or to establish rights. They are made to protect the personal representative, and the property which he holds upon trust.

These conditions merely mark the time-limit of the restraint of the creditor's right to seize under an execution. They could not confer, and do not profess to confer, any right of ownership or occupation on the Widow and children. Such a right might be created by will. Strong, clear, and emphatic language would be required to create such a right by Statute. And while a will could not, a statute could accompany such a right with an exoneration of the property from liability for the debts of the owner. Without such a right, either testamentary or statutory, the claim to it, or the hypothesis that it exists, is a fiction, and to weave such a right into the texture of a condition designed deliber-

ately for a different purpose is not only absurd but pandering to sentimentality.

As against the personal representative, clothed as I have shown with the full *dominium* of the owner, and saddled with the additional trust obligation to realize and distribute the estate, the possession of the widow and children is purely permissive.

This, in fact, is shown by the wording of the clause itself—

(*a*) It makes a restraint on the creditor.

(*b*) This restraint is in the interest of the owner's representative; and

(*c*) Its duration depends on the use of the widow and children;

(*d*) It confers no right whatever adverse to the Trust upon which the representative holds the property.

Therefore, when the representative sells under the trust imposed upon him by law, the widow and children's use of the property ends, the restraint on the Creditor is released, and his right to be paid becomes paramount.

I am dealing now, with the clear interpretation of the law regardless of sentiment. If the Statute Law is harsh and requires mollification, the rectifying function belongs to the Legislature and not to the jurist.

But the permissive possession of the widow and children, though it has no element of right, is a strategic instrument and, dexterously used, is highly advantageous to the family, the representative, and even to the Creditors. During the time that must elapse between the death of an owner and a sale or realization, many preliminaries and adjustments are necessary; and it is right and fitting during this period that neither the widow and children, nor the representative, should be unduly hustled by an aggressive creditor with the weapon of an execution in his hand. It is also right and fitting that such a creditor should not get

any advantage over a more tolerant one who is content to await the developments. It is, therefore, expedient that the representative should leave the widow and children in possession until the Sale; for by doing so not only does he provide them a home, but by force of the Exemptions Act, he erects a fortification against every aggressor.

The possession in this way works harmoniously with the carrying out of the trust obligation of the personal representative; and pending the Sale it was, I have no doubt, the design of the authors of the Exemptions Act that it should so work. If they designed any more or anything else, they fail to express it.

But what about the Widow's consent?

That is required by both the owner and his representative under the Homestead Act to any alienation by deed of the homestead. The requirement does not extend to the testamentary power of the owner. That is unfettered.

Now as no right of property, succession or possession is vested in the widow by either the Homestead Act or the Exemptions Act, the consent does not involve the parting with anything which the widow either has or might retain.

The Consent is a fetter on the ownership of another. It is an inconsequential incongruity. It is a tangle devoid of any element of legality. It may be described, as I have described it elsewhere, "the Widow's right to sit tight"—but not in the homestead. In the absence of a Will, she has no right there after her husband's death, either to sit or stand except by permission of the owner's representative.

This consent may be used wisely and beneficially in controlling the time and price of a sale; and when the widow comes to realize what her legal position is, she will no doubt use it only where it is necessary for the protection and in the interest of all the *cestui que trust*—the Creditors and next of kin of the deceased owner.

The Exemptions Act of Alberta is the same as that of Saskatchewan. But the Dower Act of Alberta, which closely corresponds with the Saskatchewan Homestead Act, does not leave the Widow's position conjectural or doubtful. Section 4 invests her specifically with a life-estate in the Homestead notwithstanding any Will of her husband or devolution by intestacy of his estate. With this divergence the argument I have advanced applies alike to Alberta and Saskatchewan.

So widespread has been the opinion that the Widow and Children have an inherent and vested right if not to the exempted property absolutely at least to its occupation as long as they live, that the viewpoint here presented has never been really brought before the Court. At all events it does not appear in any report. Until Judge Taylor's decision was rendered in the *Kolbe Estate,* the only case which touches the question is *In re Conlan,*[1] where there was a sale by a personal representative of a deceased owner without the widow's consent of a Homestead which was at the time in the use and enjoyment of the Widow and children; and Stuart, J. (Alberta), after evincing an inordinate desire for "further argument," held that the proceeds of the Sale were not assets available for creditors. It was a forced Sale he said. I have no doubt the viewpoint put forward in this article was never presented to Judge Stuart.

Judge Taylor, in the judgment referred to, quoted this Alberta case, though it is in no way parallel to the one he decided. In *Kolbe's Estate* the widow had consented to the Sale, and she appeared as a supporting party by her counsel on the Originating Summons issued by the administrator for the Court's approval of the sale.

Judge Taylor himself approved of the sale as a beneficial realization, though he said he believed the widow did not know what she was doing when she

[1] 7 W. W. R. p. 187.

signed the Consent in presence of the local registrar who certified to the contrary. The Judge further said that the widow had an understanding with the administrator that she was to be paid the surplus money coming to both her and her children without making any payment of, or provision for, the creditors. He also held that even if the widow's consent was good as to herself, it was ineffectual for the infant children whose consent he said was indispensable. If these findings were in the judge's mind they formed good grounds, from his standpoint, for disallowing the sale. But though he set them up he knocked them over and disavowed them himself by approving of the Sale and all that the administrator had done in carrying it through.

If the widow consented to the Sale, as she undoubtedly had done with all the formality prescribed by the Homestead Act, the representative required no more—not even the judge's sanction—to make and complete the Sale; and then the trust obligation was imperatively on him to distribute the proceeds according to law. And no collusive arrangement between the administrator and the widow, such as Judge Taylor stated, could oust the creditors of their right. They were ousted by Judge Taylor's decision, however, for it directed the money to be paid to the widow and children though under the widest interpretation that could be placed on the Exemptions Act all they could have claimed in the property, from the sale of which the money was produced, was a usufruct—a right to use or enjoy. Nothing in the nature of an absolute right to possess and own either the property or its proceeds exists or is anywhere shadowed. Could a collusive Sale bristling with defects and illegalities such as Judge Taylor himself stated he believed existed, expand or enlarge a limited user into an absolute ownership without the aid of either Common Law, Equity, or Statute Law? If sentiment can accomplish this, the sooner we abolish our Statutes and the Legislative function the better.

Nearly all the cases on the interpretation of the Exemptions Act and Homestead Act are collected in *National Trusts* v. *Stancuel.*[2]

Several of them are concerned with questions subsidiary to the main problem here discussed.

Two of these cases only, touch the views here advanced—*Massey-Harris* v. *Schram*[3] and *Purdy* v. *Colton,*[4] which lay it down that the language of the Exemptions Act is not wide enough to extend to the proceeds of a voluntary sale of exempted property and that the rights of Creditors against such proceeds are in full force.

I cannot, here, discuss what is a "voluntary sale," further than to say that the doctrine as applied to a Sale by a mortgagee and the rights, *inter se,* of the owner and execution Creditor to the surplus monies is not pertinent to a sale by a Personal Representative. No sale can be said to be forced unless it is made to the detriment or destruction of some right or interest; and as I have shown that the widow and children have no right to occupy or own the exempted property their only interest lies in Its sale and realization, and in the distribution of the proceeds; and every sale by the Personal Representative in carrying out his trust obligation is in free exercise of the Owner's *dominium* and a voluntary sale.

I feel constrained to observe that in discussing this I am confronted with preconceptions rather than with deliberate opinions, just as I was when I essayed the task of proving — successfully proving according to the decision of the Court of Appeal of Manitoba, and the Court of Appeal of Alberta—that the Prairie Provinces have had the English Law of Divorce for 30 years.

The preconceptions on that subject were intense.

The preconceptions on the subject now before me are ascribable to the influx of American ideas through

[2] 7 W. W. R. p. 1389.
[3] 5 Terr. L. R. 388.
[4] 7 W. L. R. 820.

such text books as Freeman on Exemptions. This book, particularly at the point quoted by Judge Taylor, smacks rather of the airy nothingness of the political propaganda than of a legal exposition. There can be no general statement of American Exemption Law, for the statutes on the subject are as diversified as the American climate; and much less can there be an application of American opinion to Saskatchewan Law seeing that there is no identity between any of the diversified enactments of the United States and the Statutes of Saskatchewan on this subject.

The same remark may be made with regard to Ontario. There is no similarity of the law of Ontario to the law of Saskatchewan on the subject of exemptions; and the reference by Judge Taylor to the decision of Sir Walliam Meredith, C.J., and the Parliamentary title of the Widow and children in *Re Tatham*[5] is simply bewildering.

The decision of Judge Meredith is absolutely correct and in complete harmony with the Ontario Statutes. But to transport that decision to Saskatchewas oblivious of the diversity in the statutory enactments and hold that *similia similibus* a "Parliamentary title" to the Homestead is vested in the widow or children of a deceased Owner in Saskatchewan by the clauses of the Exemptions Act which I have unravelled, is chimerical and contrary to the right conceptions of legal analogy.

BRAM THOMPSON.

Regina, December, 1918.

[5] 2 O. L. R. p. 343.

UNREST ON THE BENCH ALSO.

We clip the following from the Halifax *Morning Chronicle*:—

UNJUST DISCRIMINATION.

In the course of the debate in the House of Commons on the Bill to amend the Judges' Act, in reply to a protest against the discrepancy between the salaries paid to Judges in the various Provinces of the Dominion, Hon. Arthur Meighen is reported to have stated that the Judges of the smaller Provinces receive from the Government of Canada the same salaries as the Judges of the larger Provinces, such as Ontario, and that the only advantage as regards emolument which the Ontario Judges enjoy was that their incomes were increased by a grant from the Provincial Treasury for services rendered as Surrogate Judges.

This is not a correct statement of the facts. In Nova Scotia there are seven Judges of the Supreme Court, as provided for by an Act of the Legislature in 1870. Their salaries are as follows:—The Chief Justice, $7,000; six other Judges, $6,000. There are in addition seven County Court Judges.

Justice is administered in Ontario by nineteen High Court Judges, four of whom are entitled Chief Justices, and by seventy-five County Court Judges. The four Chief Justices are paid from the Dominion treasury $8,000 each, and the fifteen other Judges of the High Court $7,000 each.

In the Province of Quebec there are out of forty-eight Superior Court Judges, two Chief Justices and an acting Chief Justice, each of whom is paid $8,000 by the Dominion Government. Twenty-six of the other Judges receive $7,000.

In Manitoba, which has a smaller population than Nova Scotia, there are eleven Supreme Court Judges; five of these are engaged exclusively in appeal work, and the Chief Justice of the Court of Appeal receives $8,000, and his four associate Judges $7,000.

Saskatchewan, with about the same population as Nova Scotia, has ten Supreme Court Judges and seventeen District Judges. The Chief Justice of Appeal receives $8,000 a year, and his three associate Judges $7,000.

In British Columbia, the population of which is about 100,000 less than that of Nova Scotia (and which, by the way, has thirteen County Court Judges) there are eleven Supreme Court Judges. The Chief Justice of the Appeal Court receives $8,000 a year, and his four associates $7,000.

It must be clear from the above that the Supreme Court of Nova Scotia is placed in an inferior position in the matter of salaries to that of the courts of similar rank in the Provinces of Quebec, Ontario, Manitoba, Saskatchewan and British Columbia.

That implies a discrimination that cannot be defended. The Judges should be placed on an equal footing, as are members and senators from the various Provinces.

When the salaries of the Judges were re-adjusted in 1873, the preamble of the Statute started out with these words:

> "Whereas, it is expedient, in view of the increased cost of living consequent upon the diminished value of money and other causes, to readjust the salaries and allowances of the Judges," etc.

The words of this Statute have peculiar application to the conditions as they at present exist in Nova Scotia; but apart from any question of the increase of the salaries all round, the discrimination against this Province is, to say the least, offensive.

There is no difference in the quality of the work which the Judges of Nova Scotia are called upon to perform as compared with the Judges in other Provinces of the Dominion. Their duties demand the same high standard of professional qualifications, the work in the Courts of this Province is quite as onerous and important as in the Courts of any other Province in the Dominion, and, on the whole, the Supreme Court of Nova Scotia, in professional attainments, stands on an equal footing with similar Courts in other Provinces. Disparity in salaries is not only unfair, but unjust. Discrimination against Nova Scotia is indefensible. It should be corrected.

But the knife cuts deeper than a mere inter-provincial discrimination. A comparison with salaries paid in other British Dominions and in many American States will convict Canada of not merely parsimonious but squalid ideas of remunerating its judiciary.

The practice of eking out the inadequate pay of the Bench by appointing its members to various commissions is not a palliative, but an additional disease. The pay of a judge should be inclusive of duties on commissions, and these should not, like kissing, go by favour, but should be a matter of rotation. A Government that selects its own Commission goes into the ring with the unsportsmanlike advantage of having named the referee and umpires; and these latter are seen by the public in a light reflected by the distorted nature of the transaction.

A FAMOUS LORD CHANCELLOR OF THE GOLDEN AGE OF EQUITY.

"There is a tide in the affairs of men,
Which, taken at the flood, leads on to fortune;
Omitted, all the voyage of their life
Is bound in shallows and in miseries."

"Men at some time are masters of their fates."

Philip Yorke was born at Dover, on the first day of December, A.D. 1690. His father, an attorney, desired his only son should be bred to the like profession. He fortunately succeeded in getting him, when fourteen years of age, entered as an articled clerk without a fee, in the office of Mr. Salkeld, a reputable London attorney, Mr. Yorke's town agent. The limited means of his father did not admit of his son's receiving a university education preparatory to his entering upon the study of law. He was not at any school except a private one. His only instructor, however, was efficient. By diligent application and hard study this drawback was overcome to a wonderful extent. He gave early promise of possessing an irrepressible ambition to succeed in life, which became a distinguishing characteristic in after years. Endowed with good natural parts and the possessor of sound health, it may be said these were the principal resources upon which he could rely in the battle of life. By strict attention to duty and an obliging disposition, he soon won the confidence of Mr. Salkeld. He devoted his evenings entirely to study to overcome the defects arising from the lack of a systematic course of early education. Thus he acquired a passable knowledge of Roman classics, and by the perusal of standard authors, became fairly proficient in English literature. When, in Mr. Salkeld's office, he read most carefully Lord Chief Justice Coke's Reports, that grand repository of Common Law learning; also, Coke on Littleton, and Sir Matthew Hale's History of the Common Law of England and his Pleas of the Crown. From

these grand works he acquired the basic principles upon which he reared the lasting structure of his judicial fame. It is said, Mrs. Salkeld took the liberty with the gratis clerk of sending him on family errands, to bring necessaries for the table, of cabbages from Covent garden and oysters from the fishmonger's stall. Being a model of industry and thoroughly reliable, he was intrusted with important matters connected with the office and had charge of the cash.

Impressed by the aptitude of his clerk for legal questions, Mr. Salkeld caused him to be entered a student of law in the Middle Temple on the 25th of November, 1708, in the eighteenth year of his age. Seven years must pass before he could hope to be admitted to the Bar. The usual fees and casual expenses amounted to a large sum annually. Without the adventitious aids of wealth or family, the outlook seemed anything but promising; yet he did not bate a jot of heart or hope. At this trying juncture, however, a happy stroke of good luck changed the whole current of his life. Lord Chief Justice Parker, having casually asked Mr. Salkeld if he knew a reliable and intelligent young man who could serve as a law tutor for his sons to aid them in their professional studies, was informed he could most heartily recommend Mr. Philip Yorke, who had just entered the Middle Temple as a student, as one in every way fitted for the task. The terms agreed upon were exceedingly liberal, and Philip Yorke forthwith bade adieu to the "dingy office" on Brooke Street and was installed in a suite of fine offices, in Lincoln's Inn Fields, assigned him, stocked with a well-filled library. Relieved of the ordinary drudgery of an attorney's office and going on domestic errands for Mrs. Salkeld, he applied himself with fresh vigor and unremitting zeal in the faithful discharge of the more congenial task of imparting instruction on legal subjects. He soon won the confidence and high opinion of the Chief Justice, who subsequently became his warm friend and patron.

On the advice of the Chief Justice, he regularly attended the Courts, in Term time, taking full notes of the arguments of counsel and of the judgments delivered, and afterwards carefully revised and digested them, to assist him in his stipulated duties. His social position was happily promoted.

On the 27th day of May, 1715, he was called to the Bar by the Benchers of the Middle Temple, in the twenty-fifth year of his age. Shortly after he entered into practice, in the Court of King's Bench, travelling the Western Circuit. Now he stands at the threshold of his career. The ascent to any very distinguished eminence, in his profession, was not particularly inviting. Tidd, the great special pleader, is reported to have said:—"A barrister setting out without connections was like an attempt to launch a ship without water." Yorke, however, boldly faced the future, determined to make connections and win success by industry and hard work.

During his early practice he was retained to argue a special case, upon an intricate and important point of law. Chief Justice Parker, when delivering the judgment of the Court, complimented him highly for "the research, learning and ability he had displayed," in its conduct. His tact and skill in the conduct of a cause became proverbial. Mr. Salkeld intrusted him with many briefs; so did the young men, who were Students, when he was clerk in the Brooke Street office. Reputed to have won the "ear of the Court," and to have become a "verdict winner," his popularity was remarkable and he soon became an acknowledged "leader." Lord Campbell said of him:—"His progress was more rapid than that of any other *Debutant* in the annals of our profession."

His next adventure, that of a matrimonial alliance, was attended with like good fortune. The object of his choice was an attractive young widow, a niece of Lord Chancellor Somers, inheriting from a former husband a handsome jointure. Yorke, being a remarkably handsome young man and possessing a

charming personality, his addresses were favourably received by the lady. She referred him to her father, a gentleman of broad acres, in the county of Worcester. A letter of introduction was given him to the father of the young widow, by Sir Joseph Jekyll, Master of the Rolls. When duly presented and the desired father-in-law apprized by Mr. Yorke of the object of his visit, he was politely asked for his rent-roll. On being told that his only estate was a perch of ground, in Westminster Hall, decision was suspended for further consideration.

On being assured by the Master of the Rolls, uncle, also, of the lady in question, that the prospects of the young man were most brilliant and his character irreproachable, consent being given, the union took place, and a most happy and auspicious one it proved to be, in every respect.

In 1718, the patron of Mr. Yorke, on the resignation of Lord Cowper, was appointed Lord High Chancellor, receiving the title of Earl Macclesfield. On the advise of the new Lord Chancellor, his *protege* transferred his business to the Court of Chancery. By a systematic course of study he set himself diligently to work to qualify as an advocate in the last named Court. With intense application he read the abridgments and authorities on the subject; likewise, the standard works on the Roman civil law and the practice and procedure of the Scottish Courts of Sessions, based, as they were, upon the civil law.

Shortly after, his reputation was greatly advanced by the skill and marked ability displayed in arguing the important case of *Rex* v. *Hare and Mann*,[1] in which Sir Robert Walpole's family was interested. The case turned upon an exception to the return of a writ of *scire facias* to repeal letters Patent. He supported a demurrer on its return and argued it on two grounds: (1) upon the reason of the thing; (2) upon precedents. His argument for lucidity and irresis-

[1] 1 Strange, page 146. 1719.

tible logic stands unique. Lord Chancellor Macclesfield decided in his favour. It is said, the reputation he won in this case placed him in as high standing among Chancery solicitors as it was among attorneys in the Court of King's Bench.

Although ever on the alert for self-advancement, yet the success as achieved so far was the result of industry and earnest work. It, however, excited the envy of Chancery pleaders, who openly charged, even in Court, the Lord Chancellor with favouritism.

Through the influence of the latter brought to bear upon the Duke of Newcastle, Philip Yorke was elected a member of the House of Commons for Lewes, the object of Lord Macclesfield being to secure for his favourite appointment as a law officer of the Crown. A vacancy having occurred, on the 22nd day of March, 1720, Philip Yorke was sworn in Solicitor-General, when twenty-nine years of age, and little more than four years at the Bar. The attorneys and solicitors looked askance at the new law officer and he was made the target of their envious shafts.

Lord Campbell, in referring to this frying crisis of his life, remarks:—"By the exertion of his personal friends among the Solicitors, and being supposed to have the sympathy of the Courts; by his own great talents; by his own indefatigable industry; by the gentleness of his manner and by the insinuating complacency of his address, he rapidly overcame these prejudices and was retained in every suit."

Sir Philip won great applause, on the trial of Christopher Layer for high treason, in conspiring to bring in the old Pretender. Of his speech on that occasion, it was said:—"The Solicitor-General rose to reply, when it was late at night, and delivered a speech between two and three hours in length, which, during the whole of that time, riveted the attention of all who heard it, and was rapturously applauded as a fine specimen of judicial eloquence.

On January 21st, 1724, Sir Philip Yorke, when thirty-three years of age, succeeded Sir Robert Ray-

mond as Attorney-General, having risen to the head of the profession in less than nine years. This position he held for about ten years. In politics he was a supporter of Sir Robert Walpole, and for some time was a member of his Cabinet. Under the wise and salutary administration of Walpole, for he was the first great English finance minister, whose motto was Peace, Retrenchment and Reform, the whole political and social condition of the country steadily increased. As an official of the Crown, Sir Philip was generally acknowledged as a model of perfection. Without being regarded as a prerogative lawyer and though he invariably vindicated the just rights of the Crown, yet, at the same time, he firmly defended the privileges of the people.

During his Attorney-Generalship there sprung up the much debated controversy of the so-called rights of juries in the case of libels. According to the law, as laid down by the judges, juries were held to be judges of both facts and law. Sir Philip Yorke, however, combatted most strenuously this doctrine, holding that juries were only to decide upon the sufficiency of the evidence of publication; and upon the innuendoes, that is to say, whether the particular words or abbreviations, in the alleged libel, had the meaning imputed to them by the indictment; and that the lawfulness or criminality of the writing prosecuted was pure matter of law for the opinion of the Court.

A journal of the day, in referring to a case in which the Attorney-General contended for his doctrine, published the following ballad:—

> "For Sir Philip well knows
> That his innuendoes
> Will serve him no longer
> In verse or in prose,
> For twelve honest men have decided the cause,
> Who are judges alike of the facts and the laws."

During the fifteen years he occupied a seat in the House of Commons, all the expenses of his many elections were paid by his new patron, the Duke of Newcastle.

In 1733 by another stroke of good luck, for now by the profession generally he was called "lucky Yorke," he was promoted to the exalted position of Lord Chief Justice of England, receiving the title of Baron Hardwicke, of Hardwicke, in the county of Gloucester, and, at the same time, was sworn in a member of the Privy Council. This position he adorned, for three years and a half, with great dignity, strict impartiality and consummate ability.

When Attorney-General, Sir Philip Yorke was placed in a most unhappy position by the impeachment of his steadfast friend and patron, Lord High Chancellor Macclesfield, to whom he was largely indebted for his brilliant success. The Lord Chancellor was impeached by the House of Commons, at the Bar of the House of Lords, for trafficking in judicial offices and the robbery of widows and orphans. The attitude of Philip Yorke, with reference to his impeachment, has been subjected to sharp criticism. It was charged against him—"That he stood a silent and unconcerned spectator of the distress of the man to whom he owed all his advancement." The Lord Chancellor was found guilty and fined thirty thousand pounds and ordered to be imprisoned in the Tower until the fine was paid.

Lord Campbell, in commenting upon his conduct, remarks,—"I confess, I should have been gratified to hear that he had tried to turn the tide of public opinion, by a pamphlet, on the sale of the office of Masters in Equity, showing that it had been at all times transferred for a consideration, or that he had made one gallant speech in the House of Commons for the man who had such claims to public applause and who had drawn upon himself ill-will by befriending the friendless."

An eminent barrister, George Harris, Esq., of the Middle Temple, however, offers the following excuse for his conduct,—"Upon the whole, therefore, I cannot but think Sir Philip Yorke's conduct, in this instance, was just what it ought to have been. He refused, as

Attorney-General, and leader of the Bar, to appear against his patron and friend, in which he acted quite right; although, after all, it is undeniable that Sir Philip Yorke's merits well deserved all the favours he obtained from Lord Macclesfield. But although he could not, especially in his official position, stand forth as his friend's advocate, or the defender of his misconduct, he never refused, openly and at all hazards, to shelter him from unjust obloquy or accusation."

One step more and the clerk without a fee, in Mr. Salkeld's office, who, in early life, had experienced the bitterness of penury, step by step, with scarcely a pause, shall have reached the enviable position of holding the highest judicial office in the Kingdom, the keeper of his sovereign's conscience, Soon after the death of Lord Chancellor Talbot, in 1737, Sir Philip Yorke, when forty-seven years of age, with the full acclaim of the nation, was sworn in Lord High Chancellor. After transacting some business, he forthwith proceeded to the Court of King's Bench and delivered judgment in a case, which had been previously argued, thus having the singular honour of presiding in the two highest Courts of the Kingdom on the same day.

Such an uninterrupted and brilliant career of success reads like a romance. At this stage, however, he is about to enter upon a new sphere of activity and establish the reputation of being the greatest Chancery judge, by universal consent, in an age known as "the golden age of equity."

When appointed Lord Chief Justice, Mansfield, the founder of the Commercial Law of England, is reported to have said,—" I do not claim to have won the prize of life; I consider myself as only starting in the race." Evidently Lord High Chancellor Hardwicke did not consider the winning of such distinction to mark the limit of his aspirations. He rather considered it to indicate the starting point of the goal which he eventually reached.

An eminent authority, in referring to the fame he afterwards achieved, says:—"We are now to see him in his glory as an equity judge. Viewed as a magistrate, I believe that his fame has not been excelled by that of any man, in ancient or modern times. His decisions have been, and ever will continue to be, appealed to as determining the limits and establishing the principles of that vast judicial system called Equity."

His political career, although famous, pales into comparative insignificance when compared with his fame as the highest judge of the land. Before referring to his achievements as Lord High Chancellor, it may be incidentally remarked that in an age known as the "golden age of parliamentary eloquence," he took high rank with Pitt, Charles James Fox, Chesterfield, Pelham and Walpole. During the year 1754, the death of Pelham very nearly led to a national crisis. So long and so bitter was the struggle, that the Lord Chancellor was called into council by the King for advice and for some time acted as Prime Minister. Then it was he was created Earl Hardwicke and Viscount Royston. He succeeded in allaying party strife and obtaining for his new patron, the Duke of Newcastle, the Premiership. He, also, was the principal agent in the formation of the celebrated coalition between the Duke of Newcastle and William Pitt, in 1757, and the formation of the Ministry known as the "great administration," the most famous in the history of the nation. Earl Hardwicke became a member of this epoch-making Cabinet, which settled forever the loft pretensions of France and Spain, two great world powers, and laid upon stable foundations the commercial, naval and colonial supremacy of England, accentuating the most glorious period of its annals—"When her flag floated triumphantly on every sea." Of this Cabinet, Pitt and Newcastle were co-ordinate chiefs. Lord Macaulay thus refers to it,—"It included Hardwicke, reputed the first lawyer of the age." With reference to its distinguished leader, William Pitt, the

eminent historian further remarks,—"Without any advantages of birth or position; in spite of the dislike of the Court and of the aristocracy, the great Commoner had made himself the first man in England, and made England the first country in the world; his name was mentioned with awe in every place from Lisbon to Moscow; his trophies were in all the four quarters of the world; yet he was plain William Pitt, without title or ribbon, without pension or sinecure."

To the ability and industry of Hardwicke the nation stands indebted for many excellent parliamentary Acts, chief among which is his Marriage Act, deserving special mention. Previous to its enactment, the old Canon laws obtained and their observance was enforced, in the Ecclesiastical Courts, in accordance with the rules and procedure of the civil law. By the Canons of the Church, in 1603, a valid marriage was constituted, either simply by the consent of parties, or by the presence of a priest in orders, at any time or place, without sanction or consent of parents or guardians, although one or both might be under age. This Act of Hardwicke's forms the basis of all legislation respecting marriage in England and her colonies. Lord Harwicke held the great seal for nineteen years and eight months, a period longer than that of any of his predecessors, with one exception, that of Thomas Egerton, better known as Lord Ellesmere, who held it for twenty-one years under Elizabeth and James the first, until he resigned, A.D. 1617.

Of Lord High Chancellor Hardwicke it has justly been said,—"He was the ablest, most painstaking and authoritative Lord Chancellor who ever adorned the seat of justice." His integrity was beyond question. The justness of his decrees, numbered by thousands, became the subject of general praise. During his career as Chancellor, only three of his judgments were appealed from and these were confirmed by the House of Lords. Of the reports of his cases, in the two volumes of Vesey Senior, from 1746 to 1755, it has been said:—"It would be difficult to find, in any age or

nation, as the product of one man, a more varied or comprehensive body of legal wisdom, than is contained in these volumes." He won a reputation not excelled by a predecessor in equity, and as great as that enjoyed by the great Lord Mansfield, in the Court of King's Bench.

The labour bestowed by Hardwicke on cases which might stand as precedents, or in doubtful cases or of first impression, was simply infinite. The following is a case in point,—that of *Galton* v. *Hancock*.[2] In it was involved the question of the marshalling of assets, in a will case. Judgment was given for defendant. On petition, a re-hearing took place, in June, 1743. No precedent had been cited by either counsel. He took one year to consider the case, and in June, 1744, he delivered a most masterly decree, reversing his former judgment. The Solicitor-General appeared for plaintiff and the Attorney-General for defendant.

This judgment is well worth intent study, evincing as it does the skilful manner with which he treats the question; the fulness with which the facts are disclosed; the orderly and luminous exposition of the judgment; the fitness with which precedent after precedent is applied; the irresistible force with which he concludes his decree; and especially in the frank and ingenuous way he states his change of opinion in the following words.—"These are the reasons which induced me to alter my opinion, and I am not ashamed of doing it; for I always thought it a much greater reproach to a judge to continue in his error, than to retract." It may have been, on this occasion, William Murray, afterwards Lord Chief Juseice, made the memorable remark,—"It seemed, when Hardwicke delivered his judgments, as if wisdom had stepped forth from her throne and might be supposed to speak."

It would seem desirable, and even prove profitable, to refer to other celebrated judgments of the great

[2] 1742, 2 Atkyns, p. 424.

Lord Chancellor, but time forbids. All that can be said is:—"*Ab uno disce omnes.*"

In the three volumes of Reports by John Tracey Atkyns, of cases argued and determined in the Court of Chancery, during the Chancellorship of Lord Hardwicke, over fourteen hundred are there to be found, disclosing a great variety of important subjects and containing a most valuable storehouse of legal principles. During the period covered by vols. 1 and 2 of Vesey Senior's Reports, over 1,200 cases were decided by him.

On the 19th day of November, A.D. 1756, he resigned the Great Seal, much to the regret of the profession and particularly of His Majesty, the King.

At the time of his resignation, he had held office continuously, under the Crown, for over forty-two years. His influence, both in the different Cabinets of which he had been a Minister as well as in the House of Lords, was generally acknowledged to have been almost paramount. He was a member in the following Cabinets: that of Sir Robert Walpole; of Sir Henry Pelham; of the Duke of Newcastle; of the Coalition Cabinet of Pitt and Newcastle, during the Seven Years' War. He was requested more than once to resume his seat on the Woolsack. After his resignation he did not retire into private life to vegetate in obscurity. He continued to render assistance, when requested, in the different departments of State.

His strenuous life closed on the sixth day of March, A.D. 1764, full of years and honours, having acquired a fortune of £800,000 and won an Earldom.

His five sons all held highly responsible positions in the State: his eldest inherited the Earldom with an ample fortune; the second, after a brilliant legal and political career, wore the ermine of Lord High Chancellor, the position so long graced by his father; the third was a Diplomat, and for thirty years was Ambassador at the Court of the State's General, and subsequently was raised to the peerage, with the title of Lord Dover; the fourth was a member of the House of

Commons for several years, and afterwards enjoyed several lucrative offices under the Crown; the fifth took Holy Orders, and after several promotions finally reached the Bishopric of Ely. Of his two daughters: the eldest became Lady Anson, the wife of the famous Admiral Anson; the youngest married Sir Gilbert Heathcoate. His wife, who had pre-deceased him, was an invaluable help-mate, looking sharply after his money matters and devoting her attention closely to the education of their children, so his thoughts might not be diverted from the business of the Courts by personal concerns.

Of the numberless eulogies pronounced on Lord Hardwicke, that of Lord Chief Justice Mansfield, on account of his marked ability, carries great weight. To a legal biographer, who had asked him for certain facts respecting his career, for the purpose of publication, he replied.—" If you wish to employ your abilities in writing the life of a truly great and wonderful man in our profession, take the life of Lord Hardwicke for your object; he was, indeed, a wonderful character; he became Lord Chief Justice of England and Lord High Chancellor, from his own abilities and virtues."

"I consider Hardwicke to have been the greatest English judge in our annals," was the testimony of Sir George Jessel, the brilliant Master of the Rolls.

Lord Kenyon said of him,—"His knowledge of the law was most extraordinary, and he was a consummate master of the profession. His decisions, at this day, and in our Courts, do carry with them a more commanding weight of authority than those of any other judge; and the best editions of the elder Vesey and Atkyns will continue to fix the attention and study of succeeding ages."

Chancellor Kent, Jurist and Author, thus extols him;—"The present wise and rational system of English equity owes more to him than to any of his predecessors."

The handsome personality of Philip Yorke, coupled with upright conduct and a high sense of honour, won

for him powerful patrons, who were disposed to promote his advancement. He was no sycophant, resorting to flattery or servility to compass his aims, but favoured with a frank and manly presence, which inspired confidence and good will.

From the humble grade of professional life, at which he started, to the exalted position attained, he passed through many intermediate official stages. So efficiently and honourably were the duties of each performed, a guarantee was afforded that another more elevated would be as worthily executed.

It is said His Majesty the King frequently sought his opinion in matters outside his department and unconnected with legal or constitutional topics, for he felt the great Lord Chancellor, in the words of that beautiful Collect, "had a right judgment in all things."

He possessed the happy faculty of taking the tide, when its current served the right direction to lead on to further his advancement, for he had a keen eye for his own success and that of his family, which is quite right, if legitimately exercised.

Such then, the wonderful career of Philip Yorke, from the time of his entrance into the office of Mr. Salkeld, a humble law clerk without a fee, unknown and unknowing, until he had reached the marble chair and won an Earldom, together with the still greater distinction of having acquired the world-wide reputation of being the greatest Master of Equity Jurisprudence in the annals of the nation, whose name will be honoured as long as just and upright laws form the basis of English civilization and the pure administration of justice continue to be held sacred.

SILAS ALWARD.

St. John, N.B.

OUR LONDON LETTER.

44 Bedford Row,
London, W. C. 1.
1st May, 1919.

The Editor,
"Canadian Law Times,"
Toronto.

SIR,—Since my last Letter, I have heard with profound regret of the death of Mr. A. H. F. Lefroy, K.C. Mr. Lefroy was recognized in this country as one of the foremost authorities on Canadian Constitutional Law.

Mr. Austen Chamberlain's recent Budget Statement in the House of Commons was remarkable for the fact that a preference was given to three Imperial products (tea, cocoa, and rum) on existing duties. This innovation, although only on a small scale, gives effect to the declaration of the Imperial War Cabinet two years ago.

A number of important statutes were passed before the Easter recess. By the Naval, Military, and Air Forces Service Act power is given to prolong the period of naval, military, or air force service for such further period not extending beyond the 30th April next as the competent authority may order. The Re-election of Ministers Act makes provision for rendering unnecessary in certain circumstances the re-election of members of the House of Commons on accepting an office under the Crown, by providing that notwithstanding anything in any Act a member of that House shall not vacate his seat by reason only of his acceptance of any office of profit, provided that such acceptance has taken place within nine months of the declaration of the polls at a General Election. This Act rendered it unnecessary for members of the new Government to seek re-election.

Before the passing of the Titles Deprivation Act, 1917, a peer of the realm could not surrender or be deprived of his dignity except by death or attainder. That Act, passed to deprive enemy peers and princes of British dignities and titles, has at last been enforced by an Order-in-Council which deprives of their titles and dignities as being enemies of the King the Dukes of Albany, Cumberland, and Brunswick and Viscount Taafe.

During the war many Colonial members of His Majesty's forces have contracted marriage in this country. A Bill is now before Parliament which provides that where a marriage has been contracted in the United Kingdom during the war by a member of the Forces domiciled in any of His Majesty's Dominions or protectorates to which the Act applies, the competent Court in that part of the United Kingdom where the marriage has taken place shall (any question of domicil or residence notwithstanding) have full jurisdiction and power to hear, and determine any of the matrimonial proceedings mentioned below where the proceedings are instituted by either party to the marriage, and to make decrees and orders in relation to such proceedings as though the parties were domiciled or resident in that part of the United Kingdom. The measure is to apply to all the self-governing Dominions as from a date prescribed by their legislatures, and to any Dominion not being self-governing and to any protectorate as from a date to be prescribed by Order-in-Council. The proceedings in respect of which the measure is to apply are, in England, divorce, judicial separation, and restitution of conjugal rights; in Scotland, divorce, separation *à mensa et thoro,* and adherence; and in Ireland, divorce *à mensa et thoro,* restitution of conjugal rights, and criminal conversation. The provisions will have no application where the parties have resided together since the marriage in the country of the husband's domicil, nor to proceedings instituted after the expiration of one year from the passing of the Act.

The Barristers and Solicitors (Qualification of Women) Bill (which for some reason is not to extend to Scotland or Ireland), has been passed by the Lords and is now before the House of Commons. As the Government have smiled upon the Bill and have promised to give facilities for its discussion, it is practically certain that it will be placed on the statute book before the close of the present session. It is not to be supposed that women will enter the legal profession in greater force than they have entered that of medicine, where, although opportunity for their doing so has been afforded for fifty years, the number of qualified women is very small—only 4 per cent. of the names on the Medical Register being those of women.

Another attempt is being made to put women on a general equality with men by the removal of various restraints. A Bill has been introduced into the House of Commons to provide that a woman shall not be disqualified (1) from holding any civil or judicial office or place of profit or trust under the Crown or under any authority or body corporate or unincorporate, and (2) from sitting and voting and receiving a writ of summons to attend in the House of Lords if a peeress in her own right, and (3) if a peeress of Scotland or Ireland in her own right to vote at the elections of representative peers of Scotland or Ireland respectively, and to be elected a representative of the peerage of Scotland or Ireland, and as such to sit and vote and receive a writ of summons to attend in the House of Lords.

At present the superintendence of those authorities of the Central Government which are directed to maintaining or improving the physical well-being of the people is distributed amongst the Local Government Board, the National Health Insurance Commissioners, the Board of Education, the Privy Council, the Ministry of Pensions, and the Home Office. The Ministry of Health Bill (which has passed the House of Commons

and has been sent to the Lords), authorizes the appointment of a Minister of Health "for the purpose of promoting the health of the people throughout England and Wales," and the transference to him of the powers of the various bodies above-mentioned so far as they relate to the health of the people.

The honour of a Viscounty has been conferred upon Lord Finlay, who was Lord Chancellor from 1916 until January last. The announcement of the conferring of this honour has been cordially received by the profession, for, as the "Law Journal" says, "no man in the legal world has possessed in fuller measure the admiration and regard of his professional brethren. Throughout his long career, whether at the Bar or on the Woolsack, he has combined the qualities of a great lawyer and a great gentleman. . . . All English-speaking lawyers—for his work as an advocate and judge at the Privy Council has made his name familiar to lawyers in all parts of the Empire—will join in wishing that he may long enjoy the well-earned dignity that has been bestowed upon him."

After an interval of some five months the vacancy in the Court of Appeal caused by the acceptance by Lord Sterndale of the Presidency of the Probate Division has been filled by the promotion of Mr. Justice Atkin to be a Lord Justice of Appeal. No better selection could have been made, for during the period of nearly six years in which he has sat as a judge in the King's Bench Division the new Lord Justice has amply proved that he possesses in a marked degree those qualities which go to make a good judge; and in view of the increasing number of commercial disputes which come before the Courts, his extensive knowledge of mercantile law will be of special value. Lord Justice Atkin is an Australian by birth, having been born at Brisbane in 1867. After being educated at Oxford, he was called to the Bar by Gray's Inn in 1891, and became a K.C. in 1906. He acquired a large practice in the Common Law Courts, especially on the com-

mercial side, and in 1913 he was made a judge. During the war he has rendered the State much useful service outside the ordinary sphere of judicial work.

The vacancy in the King's Bench Division thus created has been filled by the elevation to the Bench of Mr. Greer, K.C., a mercantile lawyer of the first rank. The new judge, who was born at Liverpool in 1863, was called to the Bar by Gray's Inn in 1886. Like Lord Sterndale and many another judge who has gained distinction as a commercial lawyer, for many years Mr. Greer practised locally at Liverpool. Coming to London in 1907 he quickly acquired an extensive practice in the Commercial Court, and took silk in 1911, shortly afterwards becoming a Bencher of his Inn.

Sir Henry Bargrave Deane, until about two years ago a Judge of the Probate, Divorce, and Admiralty Division of the High Court of Justice, died on the 21st April at the age of seventy-two. Educated at Winchester and Oxford, he was called to the Bar by the Inner Temple in 1870, and took silk in 1896. When in 1905 he was raised to the Bench, Sir Henry was the recognized leader in the Divorce Court. His death is sincerely regretted by the whole profession, and particularly by those members of the Bar who practice in the Divorce Court, where for thirty years, first as an advocate and afterwards as a judge, he was a conspicuous and honoured figure. A model of judicial solemnity, he never failed during the twelve years in which he occupied a seat on the Bench to show a high regard for the responsibilities of his office.

Much interest has been aroused by the announcement that Sir Auckland Geddes, who throughout the war has been on leave from his Chair of Anatomy in the McGill University, Toronto, has resigned his position in the Government as Minister of National Service and Reconstruction to take up the office of Principal of that University. Although there have been

instances in which former members of Cabinets have accepted high positions in the Dominions, the acceptance by a Minister of the Crown of a position in a Dominion University is apparently without precedent.

After the lapse of some four and a half years a list of promotions within the Bar has been issued. In the early stages of the war it was announced that no new K.C.'s would be appointed until the restoration of peace, on the ground that the professional prospects of members of the junior Bar who were on war service would be prejudiced if the usual number of new "silks" were created in their absence. Of the 39 names in the new list nearly all are those of active members of the profession.

The enormous increase in the cost of administering the law in the United Kingdom is shewn by the Estimates for the coming financial year. The total amount required is £9,179,562. These figures shew an increase of £3,965,761 upon the amount a year ago.

The Law Society hope to raise a sum of £100,000 among the 15,000 members of the solicitors' branch of the profession for the establishment of a war memorial. Three objects are to be carried out by the funds when raised: (1) the erection of a memorial in the Society's Hall; (2) the compilation of a record of service of solicitors and articled clerks, and (3) the establishment of a relief fund for solicitors and articled clerks and the dependents of those who have been killed. It is not proposed to dispense charity, but to attempt in some small manner to discharge a debt of gratitude.

At a recent meeting of the Law Society a resolution in favour of the complete fusion between the two branches of the legal profession was carried. A poll having been demanded, voting papers were sent to all members of the Society, with the result that the motion was lost by 3,531 votes to 1,820. While there is much

to be said on theoretical grounds in favour of the abolition of the distinction between the two branches of the profession, it only requires knowledge of the real conduct of court work as divided between counsel and solicitors to realize that the existing practice has great advantages, and it is difficult to see that any great public interest would be served by the proposed change.

Although during his absence from the Courts, Lord Reading has rendered the State services of the utmost value, it is hoped that the Lord Chief Justice will shortly return to his judicial duties.

Yours, etc.,

W. E. WILKINSON.

IS IT HEREDITARY OR MERELY COMMUNICABLE?

We clip the following news item:

"In the list of 38 young men who are seeking admission to Osgoode Hall Law School there appear the names of sons of three Ministers of the Provincial Legislature: William Irving Hearst, son of the Premier; Isaac Brock Lucas, son of the Attorney-General, and Norman Batten McPherson, son of the Provincial Secretary. Among several candidates who are seeking to follow in their fathers' footsteps are John Gowans Middleton, son of Mr. Justice Middleton, and Henry Machel Taylor, son of Judge Taylor, of Sarnia. Sons of six merchants, four farmers and two doctors are also on the list. The only lady candidate is Miss Phyllis Margaret Allan, of Picton."

HOW RIOTS ARE PAID FOR.

We clip the following item from a daily paper:—

Commercial and industrial houses have within the last few days taken out riot insurance for upwards of $100,000,000. One concern alone has taken out $18,000,000 worth of insurance for its Toronto and western houses.

Ordinarily, the rates range from 16 to 30 cents per $100. To-day they average from 48 to 90 cents per $100. There are seven American and two Canadian companies handling this class of business in Toronto.

COVERS EXTRA RISKS.

Riot insurance covers damage to building, breaking of windows, damage to machinery and loss by theft. A fire insurance policy is not applicable in case of riot or civil commotion, which come under the category of explosion insurance. All policies are being issued for one year and cannot be cancelled under ninety days.

One firm alone did business covering risks totalling $5,000,000 before noon to-day.

While it is not a strictly accurate statement that riots come under the category of explosion insurance, it is a fact that the "statutory conditions" say:

6. The company is not liable for the losses following, that is to say,

(*b*) "For loss caused by invasion, insurrection, riot, civil commotion, military or usurped power."

Thus the company under its ordinary fire policy is exempted.

Neither does the municipality disturb itself unduly about so small a matter as a riot. Witness the following cases: [See Ontario Weekly Notes, March 28th, at p. 58]. *Baker* v. *City of Toronto, Speal* v. *City of Toronto.*

Motions by the Corporation of the City of Toronto, the defendants in both actions, for orders (under Rule 124) striking out the statements of claim and dismissing the actions, upon the ground that the statements of claim disclosed no reasonable causes of action against the defendants.

Rose, J., in a written judgment, said that in the Speal case the allegations in the statement of claim were: that the plaintiffs

were for more than a year preceding the occurrences thereinafter mentioned, and still were, residents and ratepayers of the city, owning and operating a restaurant; that they duly paid the rates and taxes levied against their business; that the defendants, under the provisions of the Municipal Act, employed and maintained a police force charged with the duty of preserving the peace and preventing robbery and other crimes, which force was maintained and paid out of the rates and taxes to which the plaintiffs had contributed; that on the 2nd August, 1918, the plaintiffs learned that a number of persons had been threatening violence to the plaintiffs' premises and were conspiring with the intention of destroying or damaging the plaintiffs' restaurant at about 6 p.m. on that day; that the plaintiffs notified the officers in charge of one of the police-stations of the threatened violence; that two policemen were sent to the plaintiffs' premises, but the defendants and the police force negligently failed to take any other precaution or to furnish any other protection; that, about 6 p.m. on the said day, a large number of persons, without any provocation from the plaintiffs, unlawfully, tumultuously, and riotously assembled, and broke into the restaurant and destroyed or stole the contents thereof; that, although there were members of the police force on duty in the neighbourhood, and although the defendants and the police force could readily have prevented the damage, destruction, and theft, they negligently refrained from attempting to do so; that it was the duty of the defendants and their police force to protect the plaintiffs' premises and to prevent the riotous conduct aforesaid; and that the defendants were liable for the damages sustained by the plaintiffs, placed at $5,700.

The statement of claim in the Baker case was similar.

It appeared to the learned Judge that proof of the facts alleged in their pleadings would not establish legal liability on the part of the defendants.

He referred to secs. 354, 358, 359, 360, 361, 362, 363, 367, 368; and said that there was no suggestion in the statement of claim that the defendants failed to perform any of the duties expressly cast upon them or their council by any of these sections.

There had been in many cases attempts to render municipalities liable for wrongs done by constables where acting, as it was alleged, as servants of municipalities,

In nearly all it had been held that the constables were not the servants of the municipalities, and that the municipalities were not responsible for the wrongs done by them. The position of the defendants in the present cases was even stronger; for what was complained of here was merely inaction; and, unless the act left undone was an act which the defendants were under legal obligation to do, the failure to do it did not bring the defendants under liability, even if the person who was charged with the duty of doing it was a person who, for some purposes and in respect of certain matters, could be looked upon as the servant of the defendants.

It was true that the defendants collected taxes from the plaintiffs, and that the members of the police force were paid out of the taxes; but the collection of the money was in performance of the defendants' statutory duty to assess and levy on the whole ratable property within the municipality a sum sufficient to pay all debts of the corporation; and the use of a portion of the money so raised in paying for the maintenance of the police force was in performance of the statutory duty to appropriate for and pay such remuneration to the force as the Board of Police Commissioners might determine, and to provide and pay for all such things as the Board might require for the use of the force—a very different thing from collecting the money as the consideration for a promise on the part of the defendants to protect the plaintiffs against crimes of violence

The statements of claim must be struck out and the actions dismissed, with costs if demanded."

Our cities in Ontario are policed in this fashion: The Mayor, the County Judge and the Police Magistrate form a Board of Police Commissioners. The City pay's for the cost of the police force and has no say as to the form or efficiency of the organization. Thus Toronto pays a round million a year for its police force.

The Legislature has taken care that the authority of the Municipality stops with the levying of this money. It has no rights as to its application. Normally the two judicial members of the Police Board go on hearing cases in which the public complains that the chief (and always believed) witnesses are employees of the bench. Which is as if a man had to decide between his own and the neighbour's children. When trouble arises the Police Commissioners investigate themselves and apportion the blame on others. Or in a great emergency the case is investigated by the usual Government calciminer.

Last year the Police Commissioners of Toronto investigated themselves and let enough evidence escape to show any man with military experience that in a real concerted riot the Toronto police force would not last twenty minutes. But the public was interested only in the ancient problem of "who struck Billy Patterson?" Apparently it is an eternal novelty to the

Canadian public that when you put a comfortable truncheon in a certain kind of hand every skull on the street will remorselessly fly up and hit it. And yet that is part of the natural history of Ireland.

As things stand, with no control or liability on the part of the Municipal Corporation, with the ordinary fire policy protecting the company against riot loss and with the public, the Municipal Councillors and the members of the Legislature serenely indifferent, we advise people who have valuable buildings in the vicinity of "Unrest" to place some *Riot Insurance.*

GROWTH OF CANADIAN INDEPENDENCE.

Professor A. Berriedale Keith, in the Journal of the Society of Comparative Legislation, draws the following contrast between the actual working of our constitution and the legal theory of our status:—

In half a century Canada has grown from a feeble dependency to the stature of a great nation, which claims through its Prime Minister in absolute terms a position of complete equality with the United Kingdom in the Commonwealth of Nations which constitutes the British Empire. The justice of the claim is gladly admitted by the United Kingdom, but the question inevitably presents itself of the degree to which the new status is compatible with the British North America Act and the constitutional relations between Canada and the United Kingdom. In practice, indeed, the supremacy of the United Kingdom has long ceased to bear heavily on Canada; just stress is laid by Mr. E. Porritt, in his recent study of the evolution of Canadian politics,[1] on the remarkable generosity with which, since the grant of responsible government, the British Government has favoured the growth of Canadian independence. It is well to be reminded [2] that in 1874 the United Kingdom was prepared to see Canada give a preference in her market to the United States over the mother country, if by doing so she could develop her agriculture, her fisheries, her lumber and coal industries. To Mr. Porritt, indeed, concerned as he is mainly with the actual working of the constitution, the supremacy of the United Kingdom is a thing of the past, surviving as a reality only in the domain of foreign affairs, while even in that sphere Canada has achieved the unfettered right since 1907 of making her own commercial treaties.[3]

[1] *Evolution of the Dominion of Canada.* New York, World Book Co., 1918.

[2] *Op. cit.* pp. 454-6.

[3] *Op. cit.* p. 216.

In legal theory, however, the position wears another aspect, and in formal expositions of the Canadian constitution, such as Mr. Lefroy's or Mr. W. S. Scott's interesting attempt [4] to explain, for the benefit of "the average student," the history of the Dominion constitution, full recognition is accorded to the principles which mark the subordination of Canada to the United Kingdom. If the royal veto is obsolete, there still remain the territorial limitation of Dominion legislation [5]; the supremacy of the legislation of the United Kingdom [6]; the inability of Canada to change save in minor details her constitution [7]; the right of appeal from her Courts to the Judicial Committee of the Privy Council [8]; the reservation of the prerogative of honour [9]; and, last but not least, the concentration in the hands of the Government of the United Kingdom of the sovereign right to declare war, to make peace, to conclude treaties, and to enter into diplomatic relations with other Powers.[10] The contrast between the legal position of Canada and her practical relations with the United Kingdom raises at once an interesting problem: can the equality of the Dominion with the United Kingdom become real, without legislation, by the traditional British methods of the use of the prerogative and by judicial interpretation, or must much of the British North America Act be formally abrogated as a token of a new era?

[4] *The Canadian Constitution Historically Explained.* Toronto, The Carswell Co., Ltd., 1918.

[5] Lefroy, *Canadian Constitutional Law*, pp. 80, 181.

[6] *Ibid.* p. 159.

[7] The Provinces have a general power to do so under s. 92 (1) of the British North America Act.

[8] Lefroy, *op. cit.* pp. 154, 263.

[9] *Ibid.* p. 167.

[10] *Ibid.* p. 174.

RECENT SUPREME COURT DECISIONS.

U. S. PLAYING CARDS CO. v. HURST.

ONT.] [FEB. 4TH, 1919.

Trade-mark—Playing cards — "Bicycle" design — Infringement—Passing off—Intent—Damages.

The word "Bicycle," as the name given to a certain class of playing cards, may become a valid trade-mark.

The sale by other manufacturers of cards described as "Bicycle Series," with the word "Bicycle" occupying a line in letters larger than "Series," is an infringement of the right in the trade-marks. Idington, J., dissenting.

The finding of the trial judge that a foreign manufacturer and its agent in Canada conspired to defraud the owner of its trade name and the profits to be derived therefrom should not be interfered with on appeal. Idington, J., dissenting on the ground that the evidence did not justify such finding.

In an action asking for an injunction to restrain the defendant from passing off its cards for those of the plaintiff,

Held, that though there is no evidence of actual passing off by the defendant the injunction should be granted if the defendant's cards could be passed off for those of the plaintiff and there is sufficient evidence of an intention to do so.

The plaintiff's relief in such a case would be a judgment for nominal damages with an inquiry at its own risk.

Judgment of the Appellate Division (39 Ont. L. R. 249), reversed in part and that of the trial judge (37 Ont. L. R. 85), restored in part.

Appeal allowed in part with costs.

D. L. McCarthy, K.C., and *Britton Osler* for appellant.
John Moss, K.C., and Heighington for respondent.

SMITH v. PROVINCIAL TREASURER OF NOVA SCOTIA.

N.S.] [FEB. 4TH, 1919.

Constitutional law — Succession duties — Bank stock — Mobilia sequuntur personam — Head office of bank — Local registry—Situs of property—Bank Act, 3 & 4 Geo. V. c. 9, s. 43.

By application of the rule *mobilia sequuntur personam* the transmission of bank stock by death of the owner whose domicile was in the province is liable to the duties payable under the Nova Scotia Succession Duties Act.

The head office of the bank is in Montreal, but under sec. 43 of the Bank Act a share registry office has been established in Halifax where all shares owned by persons residing in Nova Scotia must be registered and all transfers made.

Held, *per* Davies, C.J., and Idington and Brodeur, JJ., Mignault, J., contra, that the situs of shares of the stock of the bank trans-

mitted by death of the owner resident in Halifax is in the Province of Nova Scotia and liable to pay succession duties there.

Appeal dismissed with costs.

Henry, K.C., for appellant.
Newcombe, K.C., and *Jeuks*, K.C., for respondent.
Geoffrion, K.C., and *Lanctot*, K.C., for intervenant.

CLARKSON v. DOMINION BANK.

ONT.] [MARCH 3RD, 1919.

Banks and Banking—Loan to manufacturer — Security — Written promise—Advance for prior debt—"Bank Act," ss. 88, 90—Mortgage as security—Insolvency—Knowledge of bank—Mortgage on land outside province.

By sec. 88 of the "Bank Act" a bank may lend money to a manufacturer on security of his goods or raw material and by sec. 90 it shall not acquire any such security unless the liability is contracted "(*a*) at the time of the acquisition thereof by the bank; or (*b*) upon the written promise or agreement that such . . . security would be given to the bank."

Held, Anglin, J., dissenting, that sub-sec. (*b*) does not contemplate a general promise or agreement to give security for future advances, but it must have reference to a specific loan negotiated at the time on the security of specific goods.

A manufacturing company by application in writing obtained a line of credit from a bank and agreed to give security under the Bank Act on its stock and material for each advance made thereunder. Advances were made and security given as agreed. By similar applications the credit was renewed from time to time and after each renewal the bank took security not only for the present advance but for the total indebtedness of the company to that date.

Held, Anglin, J., dissenting, that this security taken for the whole debt was only valid for the amount of the loan made at the time it was acquired; but

Held, Idington and Brodeur, JJ., dissenting, that the security acquired for each individual advance was never released and did not merge in the general security so taken; the bank, therefore, was entitled to the benefit of all the securities so acquired.

In May, 1912, the company agreed to give to the bank, as further security, a mortgage on its factory site in St. Thomas, Ont., and also a mortgage on land in Montreal. The former was not executed until Nov., 1913, nor the latter until Jan., 1914. In March, 1914, the bank filed a petition for winding up the company.

Held, that in Ontario it is the date of the promise to give the mortgage that governs, and as the mortgagor was solvent at that date the mortgage on land in Ontario was valid; but

Held, Anglin, J., dissenting, that in Quebec only the date when the mortgage was executed can be considered and as the mortgagor

was insolvent to the knowledge of the bank when the Quebec mortgage was given it must be set aside.

Per Anglin, J. Insolvency to the knowledge of the bank at that date was not established and:

Qu. Can an Ontario Court set aside a mortgage on land in Quebec?

After the petition for the winding up the company had been filed the bank advanced $17,600 on security of the stock in trade and material on hand.

Held, Idington and Brodeur, JJ., dissenting, that if this advance was made, under the terms of sec. 20, Winding-up Act, with the sanction of the liquidator and for the beneficial winding up of the estate, the bank was entitled to the benefit of the security.

Judgment of the Appellate Division (40 Ont. L. R. 245), and of the trial judge (37 Ont. L. R. 591), reversed in part.

Appeal allowed in part with costs.

Hellmuth, K.C., and J. B. *Davidson*, for appellant.
D. L. McCarthy, K.C., and *Shipley*, for respondent.

VIEULLETTE v. THE KING.

QUE.] [APRIL 9TH, 1919.

Criminal law—Mixed jury—Proceedings in one language only—New trial—Substantial wrong—Art. 1019 Cr. C.

The appellant, being tried on an indictment for murder, made a statement, by counsel, that the language of the defence was French; and the trial judge directed the empannelling of a jury *de medietate linguae*. Each of the six French-speaking jurors stated to the Court at the time of their selection, that they understood and spoke both English and French. The trial proceedings were carried on in the English language. The questions submitted on a reserved case and on which there was a dissent in the Court of King's Bench, are, 1—the trial judge had not summed up the case to the jury in the French language; 2—the trial judge had commented "upon the failure of the prisoner" (who had elected to give evidence) "to testify that he had not actually committed the murder."

Held, Brodeur, J., dissenting, that, even assuming these grounds to be errors in law constituting "something not according to law . . . done at the trial or some misdirection given," the conviction should not be set aside as "in the opinion of the Court," no "substantial wrong or miscarriage" has been "thereby occasioned" to the appellant. (Sec. 1019 Cr. C.)

Per Anglin and Mignault, JJ. — Though the terms of the trial judge's charge may be thought unfair, the prisoner's evidence was open to comment by him as that of any other witness.

Per Idington, Anglin, Brodeur and Mignault, JJ.—After the election of the accused for a mixed jury, he had a right to have the case conducted in both English and French.

Appeal dismissed.

W. K. McKeown, K.C., and *A. J. McDonald* for the appellant.
Ernest Gaboury, for the respondent

CENTRAL VERMONT RY. CO v. BAIN.

GRAND TRUNK RY. CO. v. BAIN.

QUE.] [APRIL 9TH, 1919.

Negligence — Master and servant — Railway companies — "Joint operation"—Control—Limited liability of each company—Art. 1054 C. C.—Art. 1384 C. N.

The G. T. R. Co. was operating a line of railway between Montreal and St. John, P.Q.; and the C. V. R. Co. was also operating a line between St. John P.Q., and St. Albans, Vt. An agreement was entered into between the companies "to operate jointly, and as one line, the railway from Montreal to St. Albans." The same train crew was to remain in charge during the trip; but it was provided "that each party shall pay the train and engine men employed in the joint service for the service performed by them on its only line," and "that . . . the rules and regulations of" either company "shall apply while the trains are upon the lines of that company." A through train, thus operated between St. Albans and Montreal, met with a collision, on the G. T. R. Co.'s line, caused by the negligence of an engineer in charge of the train from the starting point; and the respondent's husband was killed.

Held, that, at the time of the collision, the engineer was in the employment and under the sole control of the G. T. R. Co., and the C. V. R. Co. could not be held liable for the accident.

Held, also, that "the joint service," referred to in the agreement, could only be construed as joint in the sense of being a continuous service, one part being controlled by one company and the other part by the other.

Per Brodeur and Mignault, JJ.—The agreement between both companies is not *res inter alios acta* with regard to the respondent and her husband.

Judgment of the Court of King's Bench (Q. R. 28 K. B. 45), reversed.

Appeal allowed with costs.

Lafleur, K.C., and *Beckett*, K.C., for appellant C. V. R. Co.
Jodoin, K.C., for appellant G. T. R. Co.
Surveyer, K.C., and *Ogden*, K.C., for respondent.

DIAMOND v. WESTERN REALTY.

ONT.] [FEB. 17TH, 1919.

Contract—Sale of land—Right of resale—Sales at stated periods—Power to cancel contract—Waiver—Estoppel.

A land company agreed to sell and D. agreed to buy certain lots of land at a specific price per lot. By clause six of the contract D. had the right to sell said lots, remitting to the company half of every payment by a sub-purchaser until the whole price of his purchase was paid and the balance due on any sale, when a deed was demanded by the sub-purchaser; the company to have the

right each month to examine D.'s books. By clause nine, if D. did not sell fifty lots every six months from Dec. 1st, 1914, the company could cancel the agreement and then neither party would have any recourse against the other except that D. would be liable for the balance due on any of his sales for which a deed was demanded. In the six months ending 31st May, 1916, D. did not sell fifty lots. On July 4th the company wrote him demanding payment of arrears due on sales and threatening to cancel if adjustment was not made by the 15th. On July 5th they wrote saying that by D.'s statement for June $53 should be added to the amount demanded. On July 19th they gave notice of cancellation.

Held, Davies, C.J., and Brodeur, J., dissenting, that the notice of cancellation was invalid.

Per Idington and Mignault, JJ., Davies, C.J., and Brodeur, J., contra, and Anglin, J., *dubitanti*, that the company by demanding in July payment of moneys due, knowing that a part of the same was for sales made in June, had elected not to cancel the agreement for default in the six months ending May 31st.

Per Anglin, J.—The company having in July intentionally demanded payment in the exercise of their rights under clause six, which rights could be exercised only while the contract was in force, that unequivocal act was an election to recognize it as still subsisting.

Appeal from a decision of the Appellate Division of the Supreme Court of Ontario affirming the judgment at the trial by which the action was dismissed.

Appeal allowed with costs.

C. C. Robinson and *Cohen*, for appellant.
MacMaster, for respondent.

MITCHELL v. TRACEY.

N.S.] [MARCH 17TH, 1919.
[MARCH 31ST, 1919.

Appeal—Prohibition—"Criminal charge"—R. S. C. C. 139, ss. 39 (c) and 48, Supreme Court Act—8 and 9 Geo. V. c. 7, s. 3.

An appeal from the Court of final resort in any province except Quebec in a case of prohibition under sec. 39 (*c*) of the Supreme Court Act will not lie unless the case comes within some of the provisions of sec. 48 as amended by 8 & 9 Geo. V. ch. 7, sec. 3.

Section 39 (*c*) allows an appeal from the judgment in any case of proceedings for or upon a writ of prohibition "not arising out of a criminal charge."

Held, per Davies, C.J., and Anglin and Mignault, JJ., that application for a writ of prohibition to restrain a magistrate from proceeding on a prosecution for violating the provisions of the Nova Scotia Temperance Act arises out of a criminal charge and no appeals lies from the judgment thereon.

Per Mignault, J., in Chambers. An order to stay proceedings on a judgment of the Supreme Court of Canada for purposes of a pro-

posed appeal to the Privy Council will not be granted in a case in which the Court has determined that it is without jurisdiction to hear the appeal.

Appeal allowed with costs.

Power, K.C., for appellant.
Bethune, for respondent.

MORSE v. KIZER.

N.S.] [MAY 6TH, 1919.

Registry laws — Registration of mortgage — Notice of judgment — Priority—Nova Scotia Registry Act, R. S. N. S. [1900], c. 107.

The mortgagee of land in Nova Scotia who registers his mortgage with notice of a judgment against the mortgagor afterwards registered, does not obtain priority over the judgment creditor. Idington, J., dissents.

Judgment of the Supreme Court of Nova Scotia (52 N. S. Rep. 112), affirmed.

Appeal dismissed with costs.

Morse, appellant in person.
O'Connor, K.C., for respondent.

MAGILL v. MOORE.

ONT.] [MAY 6TH, 1919.

Appeal—Amount in controversy—Lord Campbell's Act—Apportionment of damages—Negligence—Findings of fact—Inferences—Fatal Accidents Act, R. S. O. [1914] c. 151.

An action brought under the Fatal Accidents Act (R. S. O. [1914] ch. 151), by a father and mother to recover compensation for the death of their son by defendant's negligence resulted in a judgment against defendants for $1,500, apportioned as follows: $500 to the father and $1,000 to the mother. This judgment was reversed by the Appellate Division and the action dismissed.

Held, that the Fatal Accidents Act permits but one action to be brought for the entire damages sustained by the class entitled to compensation, and the appeals must be from the judgment as a whole; the full amount of $1,500 is in controversy in this appeal, and the Court has jurisdiction to hear it.

Where the determination of an action depends on inferences to be drawn from established facts and the credibility of the witnesses is not in question, an appellate court should review the inferences drawn by the lower courts and draw inferences for itself.

Idington and Mignault, JJ., dissented, holding that the inferences drawn by the trial judge were correct and that his judgment should be restored.

Judgment of the Appellate Division (43 Ont. L. R. 372) reversing that at the trial (41 Ont. L. R. 375), affirmed.

Appeal dismissed with costs.

Tilley, K.C., and *Logan*, for appellant.
Towers, for respondent, Township of Moore.
Weir, for respondent, Telephone Association.

LOCAL, PERSONAL AND OBITUARY.

F. A. McDiarmid, formerly City Solicitor of Victoria, and well known for his great interest in Navy League matters, has moved to Vancouver.

At the 41st annual meeting of the Barristers' Society of St. John, N.B., Dr. Campbell was re-elected President and Mr. John C. Belyea, Secretary-Treasurer.

The Hon. C. C. DeLorimier, who died recently at the age of 76, was for 25 years a judge of the Superior Court of the Province of Quebec, retiring from the Bench in the autumn of 1914. His personal recollections of the public life of Montreal included the crowd armed with sticks and stones attacking Lord Elgin in the turbulent days of 1849, when the Parliament Buildings were burned by the mob. As an author and editor DeLorimier was indefatigable. Among his works was a monumental publication in twenty-one volumes, "La Bibliotheque du Code Civil."

The Canadian Law Times.

VOL. XXXIX. JULY, 1919 No. 7

OUR LONDON LETTER.

44 Bedford Row, London, W.C. 1.

The Editor, 10th June, 1919.

"Canadian Law Times,"

Toronto, Canada.

SIR,—Parliament has adjourned for the Whitsun recess. Before doing so it saw the Royal assent given to one of the chief of the Reconstruction measures—the Ministry of Health Act, which, as I mentioned in a previous letter, is intended to create a Ministry for Health "for the purpose of promoting the health of the people throughout England and Wales." The Government of India Bill was also read a second time in the House of Commons before the recess. It is greatly to be hoped that the present session will see the passing into law of this important measure, affecting, as it does, the well-being of millions of people in the Great Dependency. The conclusions on which the Bill is based were only reached after discussion with the Government of India, conferences in the Provinces and at Delhi with the heads of the local Governments, and prolonged deliberation.

Lord Reading, whose services to the national cause during the past five years have been so many and remarkable, has returned to his duties as Lord Chief Justice, after sixteen months' service abroad as Minister Plenipotentiary to the United States. Lord Reading's return to the Bench was made the occasion for a ceremony presided over by the Lord Chancellor

in which Bench and Bar united to express their pride in his achievements.

A decision of great importance to Roman Catholics has just been given by the House of Lords in the case of *Bourne* v. *Keane*. By a majority of three to one their Lordships reversed the decisions of the Court of Appeal and of Mr. Justice Eve, and held that a bequest for masses for the repose of the soul is valid. The substance of the judgment of the Lord Chancellor is that since by successive ameliorations in the law, Roman Catholicism is permitted to be openly professed in this country, such a bequest has ceased to be impressed with the stamp of superstitious uses and cannot be considered illegal.

This historic judgment, being in accordance with the general principles of toleration and of religious liberty, will doubtless meet with general approval. The decision will, nevertheless, cause considerable surprise among lawyers, the more thoughtful of whom will agree with Lord Wrenbury (who dissented from the decision of the majority of the Law Lords), and the Judges of the Court of Appeal, that a change in what, for over 370 years, has been regarded as settled law ought to have been effected by legislation, and not by a novel interpretation of accepted legal doctrine. In the words of Lord Wrenbury, "certainty in the law is a thing greatly to be desired," and "acquiescence in the existing law as determined by existing decisions of long standing is preferable to a disruption of existing rights." The Lord Chancellor could not deny that in this case the House of Lords were over-ruling a view of the law which was based upon authoritative decisions of long standing. But by a broad exercise of their judgment the Law Lords have determined that the construction placed by the Courts and the profession on the Chantries Act of 1547, is erroneous. That statute has been repeatedly discussed by the Courts. Eighty-four years ago Lord Cottenham decided that bequests of the nature now declared to be valid were illegal, and his decision was

upheld in 1834, 1860, 1861 and 1875, and by the House of Lords themselves in 1917.

The business of the Judicial Committee of the Privy Council, which throughout the war has shown a tendency to increase, is substantially greater than it was a year ago, the number of cases having risen from 23 to 33. India, with its 21 appeals, as usual furnishes the bulk of the business. Three of the five Canadian appeals raise important constitutional questions. The Committee have reserved their decision on the question whether it was within the province of the Legislative Assembly of Manitoba to pass an Act enabling the electors to initiate laws and providing for a referendum. In two other Canadian cases the question at issue is as to the jurisdiction of the Courts of Manitoba and Alberta to pronounce a decree of divorce.

The Council of the Law Society are renewing their efforts to obtain a more direct control over those members of the profession who are guilty of professional misconduct. Under the Solicitors Act, 1888, the duty of inquiring into a case of professional misconduct alleged against a solicitor falls upon the Discipline Committee of the Law Society. The Committee cannot, however, proceed further than make their report to the High Court, where any necessary order is made. The present Bill, for the introduction of which Lord Buckmaster has assumed the responsibility, avoids the necessity of a report by referring the whole matter to the Discipline Committee, who will both inquire into the alleged misconduct and also make such order (such as removing the offending solicitor from the Roll or suspending him from practice) as can now be made by the High Court. There will be an appeal to the High Court from the decision of the Committee. The effect of the Bill will be to assimilate the jurisdiction of the Discipline Committee of the Law Society over solicitors to that of the Benchers of the Inns of Court over members of the Bar.

Although some six months have passed since Lord Haldane's Committee declared that a strong case had been made out for the appointment of a Minister of Justice, no steps have yet been taken to give effect to the proposal. Professional opinion is strongly in its favour, and it would be regrettable if the proposal, having once been brought into the range of practical politics, were allowed once more to fall back into the region of academic discussion. Without the creation of a Ministry of Justice, the comprehensive reform of our legal system is impossible.

The three occupants of the Bench who, having served 15 years, have earned the right to retire on a pension, will this week be joined by Mr. Justice Bray, who has been a Judge of the King's Bench Division since June, 1904. The other three Judges who continue to discharge their judicial duties although entitled to retire, are Mr. Justice Darling, who has sat on the Bench for more than 21 years, the Master of the Rolls, who has been a Judge for 18 years, and Lord Justice Warrington, who completed his 15 years of judicial service in April last. Only ten ex-Judges are at present in receipt of pensions.

Yours, etc.,

W. E. WILKINSON.

THE LIMITED VALUE OF ECONOMIC STUDIES.

The Financial History of Great Britain, 1914-1918, by Frank L. McVey, President, University of Kentucky; Oxford University Press, 35 West 32nd St., New York; $1.

Effects of the War upon Insurance, with Special Reference to the Substitution of Insurance for Pensions, by William F. G. Gephart, Professor of Economics, Washington University, St. Louis; Oxford University Press, $1.

Economic Effects of the War upon Women and Children in Great Britain, by Irene Osgood Andrews, Asst.-Sec. of the American Association for Labor Legislation, assisted by Margaret A. Hobbs; Oxford University Press, $1.

These publications of the Carnegie Endowment unquestionably do reveal industry in collecting data and painstaking and thoughtful analysis. But does the seed of such philosophic enquiry ever fall on anything but a gravel pit? With most of us it is a case of "needs must when the devil drives." Our public men have very little economic erudition although often suspected of fiscal guile. A "budget speech" usually aims at being what before the war was called "careful and conservative" and is deemed successful if business men, on reading it, acclaim the Finance Minister as a "safe man." It is probable that for some time to come the chief economic studies of the legal profession will be in lending their assistance to corporations and others persons in the preparation of returns for War Profits and Income Tax.

The third mentioned of the above works, however, reveals some facts that are more than economic cogitations and which have a bearing on the future administration of justice in the British Overseas Dominions.

> "In August, 1917, Mr. Fisher said in the House of Commons that in these years of war some 600,000 children have been withdrawn prematurely from school and become immersed in industry.
>
> "War work seems to have had most unfortunate effects on both the health and the charac-

ter of a considerable number of boys and girls. The high wages for unskilled work, absence of fathers in the army and of mothers in munition work, excessive hours of labour and greater pressure of work, interruption of club and other recreational and educational provisions, the darkened streets and the general excitement of war time were among the principal factors blamed for the change. 'Had we set out with the deliberate intention of manufacturing juvenile delinquents, could we have done so in any more certain way?' said Mr. Cecil Lerson, Secretary of the Howard Association.

"A feature almost unknown previous to the war was the movement of boys and girls under seventeen years of age from their homes to work at a distance."

It is safe to say that the restlessness induced in all these juveniles by war conditions will never permit the majority of them to return to their hum-drum pre-war conditions. The Overseas Dominions will be blessed with tens of thousands of the more enterprising; and in their midst will be Mr. Lersen's "juvenile delinquents" grown up.

Now our magisterial system—and especially our Police Court system — is not suited to the work of reforming *mere wildness*; which it confuses with degeneracy and crime. It is a system that should be thoroughly scoured before we pass through its wringer the unlucky among the enormous flood of British-born emigrants that will inevitably head for Canada and congest in our cities during the next ten years. We cannot afford to have the same crude hit-and-miss application of justice made to British emigrants that now daily occurs in our Police Courts in connection with the foreign-born, whose complaints and curses are smothered in our joyous ignorance of the languages in which they are couched.

LAWS TO ABOLISH H. C. L.

It is one of the charming inconsistencies of our public thinking that we attribute to our law-makers in the abstract a power to create the Utopia of easy living, and also to our law-makers in the concrete, the malignant inclination to make life hard and to neglect remedies for the High Cost of Living that are obvious to everybody, except the student of past legislation. Apart from the natural inclination of evenly balanced statesmen to promise the producer better prices at the same time as he is promising the consumer cheaper products, the matter is quite simple.

That is to say a Government can for a very short period—by an act of brute force—fix the prices of food and other commodities. The French Government did it from time to time during the war. We could read their schedules in every grocery and estaminet. It was simply a putting of the nation on rations commandeered for the urgent occasion.

But legislation of this kind is nothing but temporary in its success and becomes obsolete just as soon as the vendor has time to study his way out.

There is an excellent old text book, "The Famines of the World," by Cornelius Walford. In table ix., he has collected the various experiments in the internal regulation and restriction of the price of food and dealings therein.

We have counted in this table 93 enactments, which seem to comprise among them every suggestion made in these days anent the High Cost of Living. Beginning in the third year of old King John, the record comes down the ages. The older statutes were not lacking in vigour of phrase or penalty. The representative in those days of the organizing financial genius, who gathers the chief control of a product, and does not see why he should not enjoy the "normal" profits enjoyed by those in that line of business

was harshly termed a "Regrator, Fore-staller and Ingrosser."

Apparently there were regrettable incidents in the application of suasion to such enterprising people. For we find in one of the statutes dealing with them, namely, that of A.D. 1286, this precaution:—

> "Every pillory or stretchneck must be made of convenient strength so that execution may be done upon offenders without peril of their bodies."

In a statute of 2-3 Edward VI., we find that the crime of raising prices is coupled with the offence of combining in a union.

> "To constitute and appoint how much work they shall do in a day and what hours and times they shall work, contrary to the laws and statutes of the realm, and to the great hurt and impoverishment of the King's Majesty's subjects."

But the best commentary on all this legislation is that frankly contained in a Royal Proclamation in 1315, revoking an Order-in-Council (then called an Ordination), of the previous year:—

> "The King to the Sheriffs of London, Greeting:—Although we lately commanded you that in each place in the aforesaid city, where it should seem to you to be best expedient, ye should *cause it to be publickly proclaimed that oxen, cows, hogs, sheep, geese, capons, hens, chickens, pigeons and eggs should be sold at a certain price.*
>
> "Because nevertheless we have understood that such a proclamation *which at the time we believed would be for the profit of the people of our realm, redounds to their greater damage than profit.*
>
> "We command you that in the said several places ye cause publickly to be proclaimed that oxen, &c., *be sold for a reasonable price as was accustomed to be done before the said former proclamation.*"

All of which will not keep the average editor—six centuries later, from writing sentences like these:—

> "There is one way—and we believe only one—in which the Government can give effective relief to the consumer of food. That is by fixing food prices. This course should have been taken long ago. It was urged upon the Government repeatedly and from numerous quarters during the war. But a deaf ear was always turned to all arguments along this line. It was said to be impracticable. We believe this to be utter nonsense."

By all means let us have the pillory—but let it be of "convenient strength."

THE LEGAL RESPONSIBILTY FOR PRAYER.

The following article by Mr. Hayward while clothed in an appropriate midsummer garb of fiction, approaches subjects which the delicacy of the legal profession seldom permits the Courts to pass upon. It has been held in Upper Canada that Christianity in general (and not simply the tenets of particular sects) is part of the recognized law of this province, and, therefore, that to an action for breach of contract to let a public hall, a plea setting up that the purpose for which said hall was intended to be used was for the delivery of certain lectures containing an attack upon the fundamental doctrines of Christianity was a good defence [1]. We know of no Christian sect where the efficacy of sincere prayer is not of the essence of the practice and belief of the sect.

Moreover it is libellous to write anything imputing to anyone want of religious belief or charging him with giving expression to sentiments of irreverence towards the Creator [2]. Even oral words attributing want of religious belief, while inoperative as to a layman, are actionable if spoken of a clergyman because they touch him in his profession [3].

[1] *Pringle* v. *Town of Napanee*, 43 U. C. R. 285.
[2] See cases cited in 25 Cyc. 262.
[3] 18 Am. & Eng. Ency. of Law, p. 926.

A CIVILIAN PROBLEM.

By Marvin Leslie Hayward.

I am a theologian by heredity, training and natural inclination. Consequently, I detest war in every shape and form, and oppose the military caste and all its works. True, I have been called a slacker and a pacifist, and back in 1919 I had the distasteful notoriety of being burned in effigy by a mob of riotous returned "veterans," all under the age of twenty-four years. It is, however, incumbent on men of light and leading to take a decided stand on all such questions, and to "dare to be a Daniel" is the highest form of moral courage. It follows also as a matter of course, that my experience and knowledge of and concerning the law is extremely limited, and I would not have it otherwise. My one and only legal experience was so remarkable that I am constrained to commit the same to writing, having been assured by different men, learned in the law, and of experience in legal matters, that my case is unique and absolutely without a parallel, in any of the law books, ancient or modern.

I have been informed that the late Oscar Wilde, whose works I have never read, and whose daily walk and conversation bear out his name, had made the statement that he did not know whether laws were right or wrong, but from my experience, which I have mentioned, I am able to make the positive statement that they are absolutely and unutterably wrong from A to Z, from beginning to end, from Alpha to Omega, and the faintest spirit of truth, justice and fair dealing is not in them, or, I may add, in the rabble of "returned heroes" who are now overrunning our fair Dominion, living on "ready made" farms at the public expense, and drawing fat war gratuities from the depleted treasury.

To begin at the beginning, I early exhibited a strong tendency to a theological career, and, by the

generosity of a maiden aunt, I was enabled to take the full course at the Theological Seminary, and three months after my graduation I was gratified by receiving a call from the Borden Street Church, which was, undoubtedly, the leading church in the prosperous New Brunswick town where it was located, and in fact one of our strongest churches in the province.

I arrived on my new field early in September, and was more than pleased with the general air of prosperity pervading the town, as well as the fertile farming country in which it was situated, and, better still, I found that my church, building and members were all that the most sanguine clergyman could ask for under the circumstances.

The young people who, after all, in any well regulated church, are the real workers, I found extremely helpful, and no Doctor of Divinity of twenty years standing could have received better support than I did in the varied and up-to-date methods which I immediately put in force to build up the spiritual condition of my flock, and at the same time to advance the moral tone of the town in general. Without any undue disparagement, I soon found that my predecessor, while he undoubtedly did the best he could with the talents which Providence had conferred upon him, had not made use of a tithe of the opportunities lying at his door.

As I have said, I was a theologian from the beginning, and had never been susceptible to female influence. My time at the Seminary was devoted to study alone, without indulging in any of those social distractions which I am sorry to say some of my fellow students found so diverting, and I was as near "fancy free" as a young man of twenty-three could possibly be under ordinary circumstances.

My first week on my new field proved, however, that Miss Grace Williams, the only, and I must admit, charming daughter of Deacon Williams, was one of the most active workers in all the different phases of church activities, and, to my great surprise, before a month had rolled round I found that I was taking a

more than pastorly interest in our association together, and looking forward with the keenest pleasure to our frequent and protracted consultations in reference to church work.

Naturally, and I say it with all due modesty, the pastor of the leading church in a town the size of Doonville, and his personal affairs, were matters of considerable importance, and I soon began to hear audible and not unpleasant hints to the broad general effect that the neat little parsonage would soon be occupied. The idea gave me a new, strange and secular thrill, and, to make matters more agreeable still, the Deacon was, apparently, not opposed to the idea. He had been diligent in business while fervent in spirit, was, in consequence thereof, possessed of considerable worldly property, and, as I think I have said, Grace was his only daughter. I was not so ignorant of legal affairs at that time as not to know that she would in due course of time inherit the same.

During a visit to the Williams home, however, I noticed the photograph of a young, and I must admit, a rather bright looking man, wearing the then familiar and "high flown" uniform of the Royal Flying Corps, and the slight embarrassment with which Grace told me, in answer to a pointed inquiry, and after ignoring several broad hints, that it represented Flight Captain Carl Emerson, then "somewhere in France," convinced me that the possibility of a rival was to be seriously considered.

I had no difficulty in getting all the information in reference to the Captain that I required, and more too. "His name was a household word in every house in Lecarnot County," Andrew Cordie told me, and he seemed to be the idol of the military maniacs, who were then in a decided and vociferous majority. If he had "pulled off" the "stunts" that his noisy following attributed to him, to quote their elegant language, it was surprising that the German army had not been annihilated long before.

"Emerson brought down another two-seater last week—riddled the tripe out of the Germans before

they could 'man the lead pump.' Oh, say, but won't we this . . . old town wide open when Carl comes flyin' home," said a vulgar person one day while the mail was being sorted, and the Mayor of the town, who, happily, was not under my pastoral care, slapped him on the back in a boorish bar-room manner, and promised him and his class a "public holiday and the freedom of the town."

From my quiet old boarding mistress I learned that Emerson, before his enlistment, had been practising law in Doonville, and was undoubtedly the brightest lawyer of his age in the province. The widow was a rather prejudiced informant, however, as it appeared that some years before Emerson, by a piece of legal trickery, no doubt, saved her little home from the avaricious grasp of Albert Bradbury, the town shark, and had refused to accept any monetary remuneration for his services on the ground that he "drew the line at taking money from widows or orphans." No doubt he overcharged some of his wealthy customers to make up for it.

Inasmuch, however, as Miss Williams at no time gave me to understand that my attentions were unwelcome, and as my varied work absorbed a great deal of my attention, I was not unduly disturbed over the prospect of a rival *in absentia*. Besides, just about the time that I really began to realize that I was "in love," to quote a phrase worn threadbare by the trashy modern books, an important local question arose in which, from my position, it was necessary and agreeable that I should take a leading and prominent part.

In our county at that time the "Scott Act" was in force. At least it was in theory if not in fact, for it was common local knowledge that a man named Laurence was doing a small and no doubt lucrative business in fermented liquors. It hardly seemed to call for any action on my part, however, as whatever he did was done quietly, decently, and in order, and his remote ancestors were supposed to have "come in

with the Loyalists," if they had not been included in that magic circle themselves.

Then, shortly after my arrival, a man named Johnson, "a rank outsider," to drop into modern slang, with no social or family influence to back him up, came from the adjoining county, bought and opened up a new hotel, gaudily painted, and dignified by the name of "The Commercial."

Inside of three weeks one of the younger members of my congregation expressed his surprise that I was not aware that Johnson "was handling booze hand over fist," as he expressed it, and that the "Commercial men" anywhere in the county planned on making it their headquarters on Sundays.

On inquiry I found that my brother clergymen in the town became aware of the fact about the same time, so we called a special meeting of the Ministerial Association to consider the matter and decide on a plan of action.

Malcolm Graeme MacTavish, the young and raw-boned pastor of the Presbyterian Church, was in favor of the clergymen themselves making a raid upon the place, clearing it out, and giving Johnson twenty-four hours to get out of town.

"It's no use to appeal to the inspector, for he's a 'rummy' himself," MacTavish declared, "and it's up to us clergymen to take the matter in hand and not to expect somebody else to shoulder the responsibility."

This suggestion, I am glad to say, found few supporters, and after a long discussion it was decided that each clergyman should preach a special temperance sermon on the coming Sunday, referring particularly to Johnson's brazen breach of the law, and urge his congregation to take a decided stand in regard to the matter.

The next day, which was Friday, I happened to be at the evening express, and twenty-five or thirty khaki-clad "returning heroes," as the local jingo organ called them, tumbled out of the second-class car, accompanied by a young officer, whose features

I found strangely familiar. A few moments' consideration enabled me to connect him with the photograph in the Williams parlour, and to mentally decide that he was Captain Carl Emerson, my military and legal rival. I must confess, however, that I was not disturbed by this knowledge, for I felt strangely sure of my ground, and besides I was busy preparing my special temperance sermon for the coming Sabbath —a sermon which I must admit was in my humble opinion the best I had ever composed.

Sunday evening came, and the church was filled to overflowing, as the local paper expressed it. Never before had I faced so large and inspiring an audience, and some vague telepathy told me that my sermon would be an unqualified success. So strong was this feeling that it did not ruffle my composure in the slightest when I saw Emerson sitting beside Grace in the Williams pew, although I could not overlook his bad taste in wearing the uniform in the tabernacle of peace. Surely, I told myself, when she listened to my masterpiece, and compared it, which she no doubt would, with the best mental efforts of the young and beardless barrister, she would not fail to see my marked superiority, and the great and manifold advantages of linking her life with mine.

My sermon was listened to with that rapt attention which is the greatest possible tribute an orator can receive, and at its close a volley of fervent "amens" from the deacon's corner and a suppressed murmer of approval showed that my remarks had touched a responsive chord in every heart. The manuscript of my sermon I had carefully preserved, but it is too long to appear here. One paragraph of my peroration, however, is, I flatter myself, too good to omit, as it is a striking example of clerical courage in the face of entrenched evil, and strangely reminiscent of the great reformers of the early days. After reading the sections of the law referring to the sale of intoxicants, and denouncing Johnson's open and flagrant breach thereof I went on to say:—

"More things are wrought by prayer in this old world than we dream of," I had said, "and in conclusion I cannot too strongly urge upon every member of this congregation the stern necessity of going to your homes, and before you place your heads on your pillows to wrestle earnestly in prayer, as I have already done, and beseech the Throne of Divine Grace for a manifestation of divine power even to the utter destruction of this thing that offends every good citizen, in order that before to-morrow's sun floods the morning hills with its glorious light, the avenging lightning of offended Heaven might strike and utterly destroy that outpost of sin, that stronghold of Satan, where one with the soul of a devil, but the form of a man, ladles out the double distilled of Hell, which is destroying our young and rising generation, and blighting the fair name of our town. Then, my brethren, and not till then, we shall stand forth cleansed and purified from the last foul taint of that gigantic evil—the liquor traffic."

As I came down from the pulpit at the close of the service dozens of my church members crowded around and clasped my hand, and my progress down the aisle was a flower-strewed path of enthusiastic congratulation. True, as I passed the Williams pew I caught a sneering supercilious look on Emerson's worldly face, but it is characteristic of a certain stage of mental development to seek to disparage that which they cannot surpass, and the fact added to my satisfaction, if possible.

As I strolled back to my quiet boarding-house on Dexter Street, I must confess that I missed my accustomed privilege of accompanying Grace to her home, and as I made my way to my room, I found that I was strangely nervous and distraught. The inevitable reaction was setting in, and I found it absolutely impossible to sleep. I went to my little library, took out one of the new theological treatises which I had not finished, seated myself in the armchair by the window,

and tried to interest myself in the luminous language of the distinguished author.

My efforts were not very successful, and about half past eleven an old fashioned New Brunswick thunderstorm set in. The lightning flashed with unaccustomed violence, and the sound of the thunder was like the combined roar of a dozen Niagara's. About ten minutes after the storm started there came one terrific crash that seemed to shake the whole earth. I was partly paralyzed by its violence and lay back in the chair, half stunned, and listening idly to the distant roll of the receding thunder, for the storm spent itself in this grand final cannonade.

A few moments more and I heard a number of shrill and indistinguishable voices, followed by the deep tones of the firebell, and some hurrying urchin darted under my window screaming, "the Commercial's on fire," repeating it until he had passed out of hearing.

I rose and glanced out of the window in the general direction of the hotel which had been the object of my furious attack a few hours before. Sure enough, a great shaft of flame showed that it was burning merrily, and I made my way to the street, joined a group of hurrying citizens, and arrived at the scene of the conflagration.

By the time we got there the fire was already beyond the control of the local fire brigade, and inside of an hour nothing but a glowing mass of ruins marked the site of the best hotel in the town of Doonville, judged from an architectural standpoint alone.

It was two o'clock before I finally got to sleep, and I had scarcely finished my late breakfast the next morning when I was informed that a caller wished to see me. I admit frankly enough that I was surprised to find Captain Emerson waiting in the little parlour, but my self-possession, which never deserts me except under the most justifiable circumstances, instantly told me that he had come to protest against my attention to Miss Williams, and I knew enough of worldly matters to see plainly that the very fact that he had

thought it necessary to come to me on my own ground, gave me an easy and satisfying sense of superiority. I looked forward to the interview with unalloyed satisfaction and the greatest self-confidence.

"I've decided to resume the active practice of my profession in my native town," was his opening announcement, or words to that broad general effect.

I can be sarcastic and cutting at times.

"It's not much of a change from taking men's lives to taking their money," I suggested.

He laughed, apparently unoffended by my bitter sally.

"We'll not quarrel about the ethical question," he smiled, "as I just called to tell you that I have been retained by Mr. Malcolm Johnson, the proprietor of the defunct Commercial Hotel, to start suit against you immediately for heavy damages."

I laughed confidently. True, the interview had taken an unexpected turn, but I was still the undisputed master of the situation. It was a direct personal compliment that my powerful sermon had stung Johnson into a futile threat of legal proceedings.

"I think the whole town is entitled to claim damages from Johnson," I retorted. "What special grounds does your client, I think that is the proper word, allege for singling me out for this unique distinction?"

"We're going to sue you for burning up his hotel," was his astounding and impudent assertion.

"Burning his hotel," I repeated in stupefied amazement.

"Surest thing you know," was his confident response. "Didn't you ask your church members to go home and pray that the lightning would strike the hotel and burn it, and of course they obediently followed your instructions, and didn't the lightning strike the hotel inside of two hours? The result is that you were the actual cause of the hotel being burned, and we're going to sue you, right off the bat. I thought I would tell you though," he concluded, "that if you would refer me to your solicitor who would accept

service of the writ I will hand it to him instead of having it served by the sheriff in the ordinary way."

I did not exactly understand his reference, but, as I naturally wished to avoid what might be unpleasant publicity, and felt vaguely that I needed legal advice, I gave him the name of Mr. Fielding, who was the leading lawyer in Doonville, and, fortunately, a prominent member of my own church.

I felt that the fact that so prominent a lawyer as Mr. Fielding would look after my interest might dissuade a beginner like Emerson from his crazy attempt, but he jotted down the name in his little notebook without the slightest appearance of being terrified or even impressed, and left with the jaunty remark that "it would be the prettiest little case that ever came before the New Brunswick Courts."

As soon as he had departed I promptly got Mr. Fielding and the church officials on the telephone, and arranged a meeting to discuss the whole situation in Mr. Fielding's office where we met that evening at eight o'clock.

Emerson I learned, with indecent haste, had proceeded to serve the papers upon Fielding that very day, and the latter proceeded to read what he called "a brief resume of the statement of claim endorsed on the writ," which I cannot remember exactly, but which was to the effect that Johnson had owned a certain hotel, that I had requested my congregation to pray that it might be destroyed by lightning, that a few hours later and in consequence of said prayers the said hotel was so destroyed by lightning, and concluded with the astounding statement that the said Johnson claimed to recover from me the sum of $10,000 for said loss and damage so sustained by him as aforesaid, or words to that effect, for, as I have said, I do not pretend to give the absurd legal phraseology.

"The first thing we want to know, I suppose," suggested Deacon Williams, "is whether Johnson has any chance to succeed in this suit."

"That's the idea," Fielding agreed, "and I admit it's a 'stunner.' The law, I might say, gentlemen, is

found in cases which are tried out and printed in the law reports, so that no case can, I thought down to the day, possibly come up that you cannot find one something like it in the law books, and see what the Courts had decided. This case, however, is absolutely new, and I am thoroughly convinced that nothing can be found like it in any report printed in the English language."

"What's the law, then?" demanded the clerk.

"There are no precedents to fit the case," Fielding replied, "so it is impossible to say what the law is. There is really, as far as I can see, no reason, however, under the general principles governing the law—and all that we have to guide us here is the general principles—why Johnson cannot actually fight out this suit and recover damages."

"On what grounds?" demanded Deacon Williams.

"Emerson will argue, and argue very shrewdly, for he's a bright lawyer beyond a doubt," Fielding explained, "that the damages caused in this case was the 'immediate and proximate' result of the pastor's act in praying for and asking his congregation to pray for a certain result that actually did happen inside of two hours. Of course," he concluded, "the point is so fine it is useless to hazard any decided opinion one way or the other."

"Well, Emerson's no fool, I'll say that for him," declared one of the officials, who, I had felt from the beginning, had been secretly opposed to me and my work.

Fielding, however, was the greatest offender of all. He smashed his fist on the top of his desk, and declared enthusiastically that it was "the neatest point I ever heard or read of in all my professional experience," cruelly ignoring my own personal inconvenience.

"I am no lawyer," broke in one of the younger men, "but the thing looks easy to me. Let's put in a defence, and the pastor can deny that he had anything to do with burning the hotel, and then it's up to Johnson to prove it if he can. I have heard of what they call an alibi in criminal trials, and surely the pastor

can prove that he wasn't near the hotel from the time he left the church until the fire broke out."

"I can certainly prove that by the evidence of the people at the house," I broke in eagerly.

"That sounds all right on the face of it," Williams objected, "but don't you see where it lands us?"

"No," retorted the other, "except that we stand a dandy chance of winning."

"That may be very true," Williams maintained, "but don't you see that in order to succeed on the defence the pastor must claim that his prayers had no connection with the burning of the hotel."

"Sure, that would be our defence."

"Then, if the pastor puts up that defence, it is an admission that he himself had no faith in his own prayers, and did not expect them to be answered," retorted Williams.

"Which would seriously impair, if not utterly destroy, his influence in the town," suggested another member with a cold and disapproving glance in my direction.

"I'm afraid the pastor's public standing is already damaged beyond repair," declared another who had three sons at the front. "This thing's all over town already, and the returned boys are all up in arms and backing the Captain. They're going to burn the pastor in effigy down on Humphrey's corner, and the hot-headed ones want to run him out of town," he added maliciously.

I saw with my usual quick intuition that the sudden whirl of events had utterly destroyed the firm foundation on which my local reputation had rested, and I still believe I rose to the situation with commendable promptness.

"I think, brethren," I announced, "that I understand my own position and the attitude which you are adopting in regard to this matter, without making any comments upon that attitude. It simply comes down to this, that, as some one has said here this evening, we are in a serious dilemma no matter what move we make. If we decide to defend this case, the cost would,

naturally, fall upon the church, as the incident leading to the suit plainly arose out of my work as pastor. In any case, whether we won or lost, these costs would be quite heavy, and I have no desire to saddle the church treasury with any such expense.

"Besides, as has been pointed out, and I quite fully realize," I went on, "even if we won, the unpleasant publicity of the trial would destroy my usefulness and undermine my reputation as a clergyman in this town, and the fact that my stand in reference to military matters in the past does not commend itself to the returned men and the local clique supporting it, is another factor to consider. I have, therefore, come to an immediate decision, which I will not delay announcing. Under all the circumstances the logical and plain solution is for me to tender my resignation here and now, sever my connection with this church, which has been so pleasant and so hopeful for the future, and seek a new field of labour where this question will not affect me. I have felt," I concluded with an air of cheerfulness, "that my real duty lies in the broad mission field of the great and growing west."

It was gall and wormwood to my sensitive soul to see the alacrity with which they accepted my resignation, and at the same time endeavoured to conceal their evident relief.

I left immediately, and, on my way to my boarding house, I suddenly decided that inasmuch as my salary had been paid to that date in full, and I could hear the noisy and disorderly shouts of the rabble gathered on Humphrey's corner to burn me in effigy, and there was no knowing what trick Emerson might try, even going so far as to attempt to incarcerate me in a common jail from motives of personal spite, I suddenly decided that I would pack up my few belongings and leave on the evening express.

I could not refrain, nevertheless, from calling on Grace before I left, as it was not far off the direct route to the railway station, and, if anything, took me farther from Humphrey's corner and the howling mob. I knew, instinctively that there was no hope for

me, and I must confess that my reception, and my well-meant attempt to show her just what an unethical scheme Emerson had worked, met with faint success.

"Mr. Emerson is a gentleman," she maintained stoutly, "and his professional standing is of the best. He would not for a moment stoop to anything contrary to what I have frequently heard him call 'the ethics of his profession.'"

"Then why did he persecute me?" I protested.

"His taking up the Johnson case was merely a professional engagement, and I will not allow you to disparage him in his absence. Really, you are the one who has shown up poorly in the matter by resigning and running away."

Evidently she had already been informed by the Deacon of the result of the meeting in Fielding's office, and I realized that she, too, shared to some extent at least the general feeling of the church officials, but I could not give up without one last, desperate, heroic effort.

"But surely," I protested, "you can't mean that in the final analysis of your finer feelings you really prefer Emerson—a rough boisterous soldier, his better nature destroyed by three years of barbarous conflict, and coming back to you with the red stain of human blood on his hands."

My avowal was not as effective as I had hoped. The effigy burners were coming down the Williams street, singing "Where do we go from here?" and I had a well founded suspicion that they meditated physical violence to my person, unappeased by the symbolic damage already inflicted. Consequently, my last words were rather hurried and delivered with my hand on the knob of the back door, from which a convenient "short cut" led to the station.

"The crimson stain is the red badge of courage, but the white feather is —."

I stopped to hear no more. Five minutes later I caught the railing of the last car of the departing train, and just in time, for the military rabble was

close to my heels. One small grip, containing the manuscripts of some of the best and pithiest sermons I had to abandon to the tender mercies of the mob.

There is nothing more to be said. That evening I left Doonville forever, and, for obvious reasons, I have never communicated with anybody there, and have never received any news of the local happenings in the town. I am not aware how long it will take Johnson's alleged claim to be "outlawed," or what Emerson might try if he could locate me.

The Canadian Veterans are now thoroughly organized, and he might set the local society in my new sphere on my trail with dire results.

Sometimes in my quiet moments, however, I get thinking about my first and brief pastorate, and wonder whether Emerson ever married Grace, and what became of him anyway—whether he is now a bright and shining legal light in the Province of New Brunswick, or a Dominion boarder in a brick building at Dorchester.[4]

[4] Extract from the "Legal Diary" of Roscoe J. Fielding, K.C., Barrister and Solicitor, of Doonville, N.B.

Five years ago Carl Emerson was a student in my office, and I am safe in saying, possessed the keenest legal mind I had ever seen at his age. When he was admitted to the bar he opened an office here, but before he had really made a start professionally the war came on; Carl promptly closed up his office and joined the Flying Corps, where he brought down all the Hun flyers and won all the medals in sight.

When Emerson left for the front, I was satisfied that he was next door to engaged to Grace Williams, but during his absence we engaged a new preacher in our church, who was certainly shallow enough, but he proved to be pretty popular, and immediately began to pay attention to Miss Williams. In that he showed more real sense than I ever gave him credit for, as I had done Deacon Williams' business for years, knew that he was worth $25,000, and his will, giving, devising and bequeathing his entire estate to his daughter Grace, had been in my office safe for a number of years.

A few months after the new clergyman arrived, a man named Johnson opened a hotel in the town, and, as is customary and usual in our county, he began selling liquor contrary to the Canada Temperance Act in such cases made and provided.

To meet this condition the clergymen of the town set apart a certain Sunday on which each was to preach a special temperance sermon in which they all assailed Johnson, the hotelkeeper, after

the orthodox fashion, but our young man went one better, stated that he had already prayed that the hotel might be destroyed by lightning, and requested every member of his congregation to do the same. About an hour later a heavy thunderstorm set in, and the lightning struck the hotel and burned it "flatter than a pancake," as the New Brunswick people say.

Emerson had landed in town a day or two before, occupied a seat in the Williams pew that night, and I was wondering idly which one would win out, the law or the ministry.

The Monday morning after the fire Emerson called at my office, and stated that the preacher had told him that I would accept service of a writ which he was issuing on behalf of Johnson, the hotel proprietor.

I agreed at once, fancying that Johnson was starting a suit for slander on account of the rather strong statements in the preacher's sermon, and after Emerson left I started in to peruse the copy of the writ which he left with me.

I found that Emerson was bringing no ordinary slander suit, but was actually suing the clergyman for the destruction of the hotel on the ground that it had been burned in direct answer to the clergyman's prayers.

That evening the church officials, the preacher and myself discussed the whole matter in my office. While we were doing so the returned men in the town were burning the preacher in effigy, and meditating more practical methods of revenge.

I stated to the committee quite frankly that the suit was absolutely without precedent, and that it was impossible to say what the result would be, but the discussion plainly showed the delicate dilemma in which the preacher was placed by his legal opponent.

Our only possible defence would be that the preacher's prayers had had nothing to do with the burning of the hotel, which would be a direct admission that he had no faith in his own prayers and never expected them to be answered.

Finally, the preacher himself solved the problem by resigning then and there, and the effigy burners had "got his goat" to such an extent that he left on the late train that evening, and the town of Doonville saw and heard him no more, but his resignation and abrupt departure was a distinct relief to Deacon Williams, who, in common with myself and a few others, had sized him up about right.

"I was half afraid that Grace really had a notion of the poor fool," Williams told me after the others had left, "but this will be the end of the matter for good and all."

A couple of months later, the day Emerson and Grace were married, Williams told me what he had never had before, namely, that Emerson had consulted him (Williams) before starting the suit, and that it was really a "put up job" between the two.

With the preacher's departure the suit dropped, and it has always been a source of regret to me that the New Brunswick Courts missed the opportunity of deciding a point that was absolutely new in the annals of jurisprudence and which would have been commented on by every legal journal in the English-speaking world.

but I have looked into the point as well as I could and frequently tried to figure out just what the decision of the Court would have been.

As I told the church officials during the discussion, the point is so fine and there is such dearth of authority that it is impossible to hazard any decided opinion one way or the other, but I cannot convince myself that Emerson did not stand a fighting chance of winning out, as the burning of the hotel, he could have argued, was the immediate and proximate result of the preacher's act in praying for the exact result that actually did happen.

See Pollock on Torts, 27; Underhill on Torts, 32; 22 Cyc. 422, and the old and familiar "Squib case," *Scott* v. *Shepherd*, 2 Wm. Bl. 894, for further reading.

SALARIES OF COUNTY JUDGES.

In my review of "The County Judges Act, 1919," in the May number of THE CANADIAN LAW TIMES, I intimated that there would shortly be an increase in the salaries of County and District Court Judges. In "An Act to amend the Judges Act," passed by the Federal Parliament on July 2nd, 1919, sec. 16 R. S. C. ch. 138, as amended, has been repealed, and the following has been substituted therefor, as regards the Province of Ontario:—"16. The salaries of the judges of the County and District Courts shall be as follows:—

"Ontario.

Per annum.

"(*a*) Seventy-five judges and junior judges of the County and District Courts, each .....$4,000.00."

It will be noticed that provision is made for the increase of salaries of the occupants of all the senior and junior judgeships now existing in the province, including present vacancies. This means that, if no proclamation should be issued by the Lieutenant-Governor bringing into force "The County Judges Act, 1919," passed at the last session of the Ontario Legislature, all the existing judgeships, including present and future vacancies, may be filled at the increased salary.

It will also be noticed that the salary of the senior judge of the County of York, which was heretofore $500 larger than that of any other County or District Court judge in the province, will now be only the same as that of the others. That this was done after careful consideration, is shown by the answer of the Acting Minister of Justice to the leader of the oppposition who suggested that it was an oversight. The Minister, as reported in Hansard of July 2nd, made the following explanation:—"There was no oversight at all. It is true that, in certain cities, the senior County Court judge has been receiving a salary of $3,500; in such cases, in addition to the salary under this legislation will be only $500. . . . Usually the capital of the province was the city where the extra

$500 was given, but that was not always so. Nor, indeed, were it so, could it be held to warrant its continuance, for the reason that there were other cities, in some cases as large, or even larger, than the capital of the province, in which it would be inequitable to deny the senior judge the additional salary he would receive in the capital of the province. Consequently, I thought it would be better to make a round salary of $4,000 applicable everywhere, and then to endeavour to meet inequalities that might exist by a rearrangement of jurisdictions, such as is now being provided for in Ontario, and such as I think, should be provided for in every province. Hereafter every County or District Court judge will obtain exactly the same salary from the treasury of Canada, $4,000. That means an increase of $1,000 almost universally, but in some cases it means just $500 increase."

As regards annuities to County Court judges, section 24 of The Judges Act is as follows:—

"24. If any judge of a County Court becomes afflicted with some permanent infirmity disabling him from the due execution of his office, and resigns his office, or if a judge of a County Court, not having attained the age of seventy-five years, resigns his office after having continued therein for a period of at least twenty-five years, His Majesty may, by letters patent under the Great Seal of Canada, grant to him a pension equal to two-thirds of the annual salary of which he was in receipt at the time of his resignation, to commence immediately after his resignation and to continue thenceforth during his natural life: Provided that if such judge has only continued in office as such judge for a period of less than five years, the pension which may be so granted to him shall not, unless the judge has attained the age of seventy-five years, exceed one-third of the annual salary of which he was in receipt at the time of his resignation."

" 2. If any person, receiving a pension under this section becomes entitled to any salary in respect of any public office under the Government of Canada, such salary shall be reduced by the amount of such pension." This is amended by section 11 of the new

Act, which, in so far as it applies to county judges, reads as follows:—"No annuity shall be granted to any judge under the provisions of section . . . twenty-four, unless the Governor-in-Council is of opinion that it is in the public interest that such judge should resign his office. The provisions of this section shall not apply to any judge appointed before the coming into force of this Act." It will be noticed that this new section does not profess to deal with section 25 of The Judges Act, which provides for the compulsory retirement of a county judge at the age of seventy-five years, and for the voluntary retirement after thirty years' service, in either case with full pay; so it is assumed that such judges will still continue to become entitled to their annuities under this latter section, notwithstanding the change in the law.

Sub-section 3 of section 27 of The Judges Act provided that "the salaries and retiring allowances or annuities . . . shall be free and clear of all taxes and deductions whatsoever, imposed under any Act of the Parliament of Canada." Section 13 of the new Act, however, provides that this exemption "shall not apply to any judge whose salary is increased by this Act." This means that all present and future county and district judges in Ontario will have to pay the present Federal income tax, so long as the same continues in force. Apparently, however, judges of the Supreme Court of Ontario will continue to be exempted, since their salaries have not been so increased, as have those of the Supreme Court judges in all the other provinces except Quebec. As regards the assessment of salaries of County Court judges for municipal purposes, this has, after considerable litigation, been definitely decided in the affirmative, by the Appellate Division, in *City of Toronto* v. *Morson*.[1] I understand, however, that this question is now pending before the Judicial Committee of the Privy Council.

M. J. GORMAN.

Ottawa.

[1] 40 O. L. R. 227.

IN THE EXCHEQUER COURT OF CANADA.

THE KING v. JOHN M. KILBOURN.

Expropriation — Riparian rights — Water-powers — Public work— 7 Wm. IV. ch. 66—9 Vic. ch. 37, sec. 7—B. N. A. Act, sec. 108— Valuation of water-powers.

The River Trent by a series of statutes was appropriated by the Crown for the purpose of constructing the Trent Canal. At the time of Confederation the whole river from Rice Lake to the Bay of Quinte had become part of the canal system.

Held, that the river had, under the circumstances, become a public work of Canada and passed by section 108 of the B. N. A. Act to the Dominion at the time of Confederation.

2. That the title of defendant to lots on the river did not carry with it the *solum* or bed of the river, and therefore the defendant had no legal right to compel the dam erected above his lots on the river to be maintained by the Crown.

3. In estimating the value of a water-power the cost of exploiting the same must be considered. That being so, even if the river in question were not a public work, no value as enuring to the defendant could be placed upon the water-power, as it would cost more to develop than the results to be attained would justify.

The King v. *Grass*, 18 Ex. C. R. 183, referred to.

G. A. Payne, for plaintiff.

F. H. Kilbourn, for defendant.

Strachan Johnston, K.C., and *G. A. Payne*, for plaintiff

Robert McKay, K.C., and *W. H. Wright*, for defendant.

Case tried at Toronto, Ont., January 20th, 21st, and February 27th, 1919. Cassels, J.E.C., May 26th, 1919, delivered judgment.

RECENT SUPREME COURT DECISIONS.

SHEPARD AND THE MERCHANTS BANK AND BRITISH DOMINIONS GENERAL INS. CO. v. SHEPARD AND THE MERCHANTS BANK AND GLENS FALLS INS. CO.

[FEB 19*th*, 20*th*, 1919; MAY 6TH.

Insurance—Fire—Policy—Conditions—Notice of loss—Proof of loss—Irregularity—Relief—Specified delay to begin action—Action premature—"The Fire Insurance Policy Act," R. S. Sask. 1909, c. 80, s. 2—"The Saskatchewan Insurance Act," Sask. S., 1915, c. 15, s. 86.

Insurance policies against fire were issued by the companies respondent owned by the appellant Shepard with loss, if any, payable to the appellant bank, assignee of a mortgage on the property. The buildings were subsequently destroyed by a fire occurring on the 1st and 2nd April, 1915, of which the agent of the bank informed the companies respondent.

In the course of their investigation, they suspected some incendiary origin and declined payment for a considerable delay. The proofs of loss were furnished on the 29th February, 1916.

The statutory condition No. 13 part of the policies, required that the assured himself should give notice in writing to the companies; deliver a detailed account of the loss, and sign a statutory declaration as to the truth of his statements. According to another condition, no action could be brought after the expiration of one year from the date of the loss.

The statutory condition No. 17 also provided that "the loss shall not be payable until thirty days," in the case of one policy, and sixty days in the case of the other policy, "after completion of the proof of loss." On the 22nd March, 1916, the present actions were commenced, before the lapse of the required period, so that they may be instituted within the delay of one year from the date of the fire.

Held, that this Court should not interfere with the discretion exercised by the trial judge in deciding that the non-performance of condition No. 13 had been due to mistake and that relief should be granted to the assured under section 2 of "The Fire Insurance Policy Act."

Per Idington, J.—As the notice was not given "forthwith after loss," and the proofs were not delivered "as soon afterwards as practicable," they cannot be accepted as made in compliance with the terms of the policy and therefore cannot be used to fix the time when the actions should be brought.

Per Anglin and Cassels, JJ.—The proofs of loss became of value and were "completed" only when the trial Court exercised its statutory power to give relief; and the effect of granting it was to put the assured in the same position for all purposes as if the proof had been furnished as required by the statutory condition

No. 13. Accordingly, the respective periods prescribed by statutory condition No. 17 should be deemed to have elapsed before the actions upon it were begun.

Per Davies, C.J. and Mignault, J.:—Section 2 of "The Fire Insurance Policy Act" did not give power to the Courts to relieve against refinements of statutory condition No. 17.

Judgment of the Court of Appeal (11 Sask. L. R. 259), reversed, Davies, C.J., and Mignault, J., dissenting.

Appeal allowed with costs.

J. A. Allan, K.C., for the appellant.

Travers Sweatman, for the respondent.

FINDLAY v. HOWARD.

QUE.] [MARCH 20TH AND 21ST, 1919; MAY 19TH, 1919.

Evidence—Admissibility—Breach of contract—Action in damages—Facts posterior to institution of action.

In an action for damages arising out of a wrongful breach of contract, events which happended between the date of the commission of the wrong and the time of the trial must be taken into account in estimating the loss for which the plaintiff is entitled to compensation and in determining what actually was the value of the contract to him at the date of the breach. Brodeur, J., dissenting.

Appeal allowed with costs.

Cross-appeal dismissed with costs.

Lafleur, K.C., and *Geoffrion*, K.C., for the appellant.

Tilley, K.C., and *Perron*, K.C., for the respondent.

GRANGER v. BRYDON-JACK.

QUE.] [MAY 7TH, 1919; MAY 19TH, 1919.

Evidence—Finding of facts by trial judge—Appeal—Mortgage—Given as security or payment—Parol evidence—Time of payment not fixed—Reasonable time.

B., having bought from G. a four-fifths interest in a yacht, gave him a mortgage on real estate for the amount of the purchase price. The deed provided "the principal to be paid out of the first proceeds of the sale of the equity of the mortgagee;" and there was no covenant of personal liability of the mortgagor to pay the debt. The evidence of both parties was in direct conflict as to whether the mortgage had been given in payment of the purchase price merely as security.

Held, that in the circumstances the Court of Appeal was not justified in reversing the finding of fact of the trial judge, who had declared the mortgage to have been given as security only.

Per Davies, C.J.:—The absence in the deed of a covenant as to the personal liability of the mortgagor to pay the debt, is not material.

Per Idington and Anglin, JJ.:—The result of the failure to fix a time for payment is that the debt became payable within a reasonable time according to the intentions of both parties and having regard to all the circumstances.

Per Anglin, J.:—Parol evidence was admissible to establish whether the mortgage had been given as payment or as security.

Judgment of the Court of Appeal reversed.

Appeal allowed with costs.

Geo. F. Henderson, K.C., for the appellant.

F. H. Chrysler, K.C., for the respondent.

GAVIN v. KETTLE VALLEY RLY. CO.

B.C.] [MAY 6TH, 1919; MAY 19TH, 1919.

Negligence—Joint negligence—Proper direction to jury—Practice and procedure—New ground on appeal—Costs against appellant—Statutory right—Question of costs—Duty of the Supreme Court to interfere—"Supreme Court Act" of British Columbia, R. S. B. C. 1911, c. 58, s. 55.

In an action for damages, the jury found negligence on the part both of the respondent's employees and of the appellant's wife who was driving his automobile; and the jury, answering to a further question, also found that, after these employees became aware, that the automobile was in danger of being injured, they could have prevented such injury, in the exercise of reasonable care, by the speedy application of brakes.

Held, that the jury should also have been required to find whether the appellant's wife could have avoided herself the accident by the exercise of reasonable care; and therefore the Court of Appeal was justified in ordering a new trial; Brodeur, J., dissenting on the ground that, upon the evidence, the accident was entirely due to negligence of appellant's wife. But

Held, Idington and Brodeur, JJ., dissenting, that, as the "ground of objection" before the Court of Appeal had not been "taken at the trial," the order should have been granted with costs against the then appellant, now respondent, pursuant to section 55 of the "Supreme Court Act" of British Columbia.

Per Davies, C.J., Anglin and Mignault, JJ.:—It is within the jurisdition and duty of the Supreme Court of Canada to reverse an order as to costs, when a party, having a statutory right to receive his costs on certain proceedings from his opponent has on the contrary been ordered to pay that opponent's costs, prin-

cipally when the appeal to this Court, its merits being arguable, was evidently not brought merely for the purpose of introducing that question of costs.

Judgment of the Court of Appeal (1918), 3 W. W. R. 385, affirmed as to merits, but reversed as to costs, Idington and Brodeur, JJ., dissenting.

Appeal allowed in part with costs.

Martin Griffin, for the appellant.
W. N. Tilley, K.C., and *A. J. Thomson* for the respondent.

TOWN OF COBALT v. TEMISKAMING TELEPHONE CO.

ONT.] [JUNE 2ND, 1919.

Municipal corporation — Franchise — Telephone Company—Use of streets—Time limit—Ontario Municipal Act, 1903, 3 Edw. VII., c. 19, ss. 330, 331 (1) and 559 (4).

The Legislature of Ontario has not given the municipalities of the Province authority to permit telephone companies to occupy the streets and highways with their poles and wires for a longer period at one time than five years.

Judgment of the Appellate Division (44 Ont. L. R. 366) reversed, that on the trial (42 Ont. L. R. 385) restored.

Appeal allowed with costs.

Tilley, K.C., for appellant.
H. J. Scott, K.C., for respondent.

A. MACDONALD CO. v. HARMER.

SASK.] [MAY 6TH, 1919.

Constitutional law—Statute—Companies Act, R. S. Sask. (1915), c. 14, ss. 23 and 25—License to do business in province—Dominion Companies.

Sections 23 and 25 of the Saskatchewan "Companies Act" requiring all foreign companies as a condition for doing business in the Province to be registered and take out an annual license is *ultra vires* of the legislature and applies to, and may be enforced against, a company incorporated by the Parliament of Canada to do business throughout the Dominion. *John Deere Plow Co.* v. *Wharton* ([1915] A. C. 330), dist.

Judgment of the Supreme Court of Saskatchewan, *Harmer* v. *A. Macdonald Co.* (10 Sask. L. R. 231), affirmed.

Appeal dismissed with costs.

Winegast, for appellant.
C. C. Robinson, for Dominion of Canada.
Nesbitt, K.C., and *Barton*, for Ontario.
Chrysler, K.C., for Manitoba and Saskatchewan.
L. Davies, for respondent Harmer.

GREAT WEST SADDLERY CO. v. DAVIDSON.

MAN.] [MAY 6TH, 1919.

Constitutional law—Statute—Manitoba Companies Act, R. S. M. [1913] c. 35—License to carry on business in Province—Dominion companies.

The provisions of Part IV., Class VI., of the Manitoba Companies Act (R. S. M. [1913], c. 35), requiring companies incorporated by the Parliament of Canada to be registered and take out an annual license as a condition of doing business in the province is *ultra vires* of the legislature. *John Deere Plow Company* v. *Wharton* ([1915] A. C. 330), distinguished. Davies, C.J., and Mignault, J., dissenting.

Appeal dismissed with costs.

Mignault, J., dissenting.

Wegenast, for the appellant.

C. C. Robinson, for Dominion of Canada.

Nesbitt, K.C., and *Barton*, for Ontario.

Chrysler, K.C., for Manitoba and Saskatchewan.

L. Davies, for the respondent.

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THE CONSTITUTION OF CANADA.

CANADA'S SUZERAINTY OVER THE WEST.

BY

BRAM THOMPSON, M.A., BARRISTER-AT-LAW.

None of the works on the Constitution of Canada contains a word on the competence of the Parliament of Canada to create in this country a *dominium in dominio*. It may be the Constitutional writers took it for granted that such a thing could not be legally done. But that is merely glossing a fact into obscurity by an assumption; and it is the aim of this article to remove the gloss and lay bare the reality in all its nakedness.

The Parliament of Canada, avowedly under powers conferred upon it, has established in the North-West Territories the three new Provinces of Manitoba, Saskatchewan and Alberta, and it has, at the same time, divested them of their land which is held and administered by the Dominion Government for the purposes of Canada.

If this is legal then the Federal character of the Dominion is destroyed. The new provinces are not provinces of Canada except in name; they are subordinate organizations; the Dominion Government is their Grand Suzerain; and the Dominion itself is their Sovereign and not the King in right of his Imperial Crown.

We have here a problem vital and momentous; and for clearness I state it historically.

I. Historical Facts.

The scheme of the B. N. A. Act, 1867, was to confederate the then existent colonies of British North America on a basis of equality of status and rights.

To facilitate and promote this aim, the colonies themselves abandoned their charters, and as nude Entities, except that each retained its own institutions and laws as they then were, they entered the union and became instantly provinces of the Dominion of Canada invested with the status and autonomous rights prescribed by the Act; while the residuum of legislative and governmental power common to all, and over and above that conferred on them individually, was simultaneously reposed in the Dominion, which by their union they formed, and in its Parliament—the Parliament of Canada.

This Dominion was designed in the fullness of time to become a Sovereign Nation. But pending the evolution it was under the structure of the Confederation, unable to assert any dominance over its constituent provinces. It was restrained in this way:—

First as regards Legislation and Government.

The Dominion and the provinces were designedly kept apart and independent. Each derived its authority directly from the B. N. A. Act; and each was circumscribed in its sphere.

Secondly as regards the Land.

(*a*) Each province was invested with its territorial *dominium* under the Crown over all land within the boundary; and

(*b*) The Dominion, as a consequence, was deprived of all land except what it might have under section 108 or acquire from the provinces under section 117 for the purposes of public works and undertakings reposed in its exclusive control by the B. N. A. Act, 1867.

This was the immediate and intended effect of Confederation on Ontario, Quebec, New Brunswick and Nova Scotia; and it approximated the provinces of Canada nearer to Sovereign States than it did the Dominion to a Sovereign Nation.

The ultimate aim was that the Dominion as thus constituted should expand over and embrace the whole of British North America, similarly divided into provinces all of perfect equality in status and rights.

In accordance with this aim provision was made by the B. N. A. Act, 1867, to admit into the Union, Newfoundland, Prince Edward Island and British Columbia, upon addresses from their respective legislatures, and to similarly admit into the Union Rupert's Land and the N.-W. Territory upon an address from the Parliament of Canada—all upon such terms as should be stated in the respective addresses and approved by the Imperial Government; and all "subject to the provisions of this Act."

Rupert's Land and the North-West Territory were the first to enter the Union under this provision.

It is certain there had been no intention of the Imperial Government to admit them to the Dominion till they had been to some extent, at least, fitted for the status. It had been, and, if the Union had not interposed, it would still have continued to be, the duty of the Imperial Government to develop them and invest them with a colonial status and equipment just as had been done for the colonies East and West of them; and then to give them the choice of entering or remaining outside the Dominion.

Canada, however, saw the possibility of a rival Western Dominion; and almost the certainty of British Columbia entering it unless she was induced first to enter Canada by acceding to her stipulation for a transcontinental railway. Canada eagerly desired to avert such a catastrophe. The accession of Rupert's Land and the North-West Territories to the Union was essential to her design. Vehemently, therefore, and persistently she urged that "it would conduce to

the advantage of the Empire if the Dominion of Canada, constituted under the provisions of the B. N. A. Act, 1867, were extended westward to the Pacific Ocean."

Entry of the Territories to the Union became inevitable though both Governments realized it was entirely premature.

In acceding, however, to the Canadian request, the Imperial Government stipulated, as a *sine qua non,* that there should be an adjustment between the two Governments of the responsibilities in regard to the Territories during their adolescence; and Canada, recognizing the great object to be attained both in her present progress and in her future aggrandizement, promptly agreed to undertake the obligations which otherwise would have fallen on the Imperial Government.

This undertaking, as well as the purposes of Canada regarding the Territories, were set out in an address presented by the Parliament of Canada, and thereupon an Order in Council pursuant to the B. N. A. Act, 1867, and the Rupert's Land Act, 1868, was made on the 23rd of June, 1870, which admitted Rupert's Land and the North-West Territories to the Dominion. It contained also, in conjunction with Rupert's Land Act, the powers conferred upon the Parliament of Canada for performing the obligations so undertaken.

These will be discussed hereafter.

That Canada was then in a hurry, is seen from the fact that it had passed an Act constituting Manitoba a province, before the Territories themselves were admitted to the Union. But the Act was only to come into operation, *ipso facto,* with the issue of the Order in Council admitting them.

This impetuosity resulted in trouble. It was at once seen that the Parliament of Canada had no authority, express or implied, to organize or establish provinces. Manitoba, as a consequence, was in a precarious position constitutionally.

To validate what had been done, the B. N. A. Act, 1871, was passed.

It enacts:—

"That the Parliament of Canada may from time to time establish new provinces in any territories forming, for the time being, part of the Dominion of Canada . . . and may at the time of such establishment make provision for the constitution and administration of any such province and for the passing of laws for the peace, order and good government of such province and for its representation in the said Parliament."

And also, "that the Parliament of Canada may from time to time make provision for the administration, peace, order and good government of any territory not included in any Province."

From this time till 1905 all the Territories outside Manitoba, were governed by the Dominion, and after some temporizing expedients a legislature evolved very much akin in external form, at least, to the Provincial Legislatures under the B. N. A. Act. It was, however, more limited, and was of course created by, and subsidiary to, the Dominion Parliament.

I do not question this at present.

In 1905, however, two other Provincial areas were demarcated in the Territories and the Dominion Parliament by two concurrent Acts, which recited its powers to establish provinces as I have set out above, and that it was expedient to exercise them, enacted that "the territory comprised within" the boundaries of each of the demarcated areas "is hereby established as a province of the Dominion of Canada to be called and known as"—one the Province of Saskatchewan, and the other the Province of Alberta.

Mutatis mutandis the two Acts are identical.

Each of them has a section:—

" The provisions of the B. N. A. Act, 1867 to 1886, shall apply to the New Province in the same way and to the like extent as they apply to the provinces here-

tofore comprised in the Dominion as if the said Province had been one of the Provinces originally united, except in so far as varied by this Act."

And another section:

"All Crown lands, mines and minerals and royalties incident thereto . . . shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada."

The Manitoba Act, 1870, contains corresponding sections.

These are the historic facts stated as concisely as is consistent with clearness.

The section relating to the lands of these new provinces is the one with which this exposition is concerned. With a Titanic sweep it disjoints the constitution of the Dominion of Canada created by the B. N. A. Act, 1867, by:

(*a*) Placing the new provinces in a position of inequality with the other provinces.
(*b*) Appropriating their land to the Dominion.
(*c*) Depleting them of their legislative authority over provincial land.

The land, therefore, and the authority of the Parliament of Canada over it, lie at the root of the problem.

Henceforth in this article I will include both Rupert's Land and the North-West Territory in the word "Territories"; and I shall proceed in this order:—

1. RIGHT TO THE LAND.
   (*a*) By the Territories.
   (*b*) By the Provinces.

2. LEGISLATIVE AUTHORITY OF PARLIAMENT OF CANADA.
   (*a*) Over the Territories.
   (*b*) Over the Provinces.

II. Right to the Land.

(a) *By the Territories.*

Prior to their admission into the Dominion, the Territories were vested in the Crown in right of the United Kingdom whose Parliament controlled them even to the extent of alienating them.

At their admission there was neither Transfer, Surrender nor other transmission to the Dominion of Canada of the title of the Crown, the right of the United Kingdom, or the authority of the Imperial Parliament.

The Dominion, therefore, never was invested with any right, title or beneficial interest in the Territories.

The Territories were admitted to the Dominion as constituted under the B. N. A. Act, 1867. Under that Act, the entities among them owned all the land of Canada; and the Dominion had no land nor could it acquire any, except from the provinces as already stated.

If the Imperial Parliament had merely intended to hand over, or if the Dominion had merely sought to get, the Territories as Dominion land or as a *Res Commune* of the then constituent provinces of Canada, the B. N. A. Act, 1867, would have required such fundamental changes as would have upset the old constitution and replaced it with a new.

That certainly was never the intent; for the Territories were admitted to the Union by the conjoint action of the Imperial and Dominion Governments expressly for the purpose of "extending the Dominion as constituted under the B. N. A. Act, 1867, westward to the Pacific coast."

This Act completely excludes Dominion land in any shape or form, except as stated; and the Dominion under it had neither capacity to own nor to control the Territories.

The Territories were admitted into the Dominion in 1870 by words identical with those used in admitting

to it in 1871 British Columbia, and in 1873, Prince Edward Island. The Territories were not fused with or absorbed into the Dominion, and they did not become a *Res Commune* of the other provinces, nor were they constituted Dominion lands. They formed, just as did British Columbia and Prince Edward Island when admitted subsequently, two separate and distinct entities of the Dominion of Canada, and unless as such entities they had their land and the *dominium* over it these results follow:

(*a*) They still continued after the Union to be vested in the Crown in right of the United Kingdom; and

(*b*) They were admitted to the Union subject to an Act which ignores them and has not even till this day a provision relating to them.

This is a *reductio ad absurdum* with a vengeance!

The constitutional fact is that the Order in Council admitting the Territories made in 1870 in pursuance of the B. N. A. Act, 1867, and the Rupert's Land Act, 1868, operated:

(*a*) To establish two new Entities of the Dominion of Canada.

(*b*) To surrender or transmit to these Entities the right of the United Kingdom in their land; and

(*c*) To change the title of the Crown accordingly.

So long as, and in so far as, they remained integrities of the Union this condition continued. But the policy of dividing them into Provinces began almost instantly.

(*b*) *By the New Provinces.*

The power to constitute new provinces is conferred upon the Parliament of Canada by the B. N. A. Act, 1871, thus: "To establish new provinces in any Territory forming for the time being part of the Dominion of Canada."

This phrase itself—"forming part of the Dominion"—recognizes the status in the Union of the Enti-

ties formed by the Territories; for every province is only a part of the Dominion for the purpose and to the extent set out in the B. N. A. Act, 1867, but not otherwise. There is no fusion of territory; only of rights. The power authorized the Parliament of Canada to carve out or delimit an area of the Territories; to establish it, by enactment, a province of Canada; and thereupon this new creation became a new Entity of the Dominion invested, as such, with its status and rights under the B. N. A. Act, 1867.

The time for exercising this power was discretionary with the Parliament of Canada, but the Act itself was perfunctory. It could not attach any terms or conditions, and it could not work itself out piece meal by first conceding the right of self-government and reserving the land for a future dole. It was a power when exercised, and an Act when done, that were complete, indivisible and irrevocable, and their effects instantly find their expression in, and control by, the B. N. A. Act, 1867.

The land adhered to the new Province by Succession from the larger entity out of which it was carved.

It is said, however, that the Parliament of Canada could establish a Province without its land. There are but two kinds of Province—a Province which is only a geographical name for a territorial division of a country whose government is entirely outside the division and centred elsewhere, and a Province which is essentially a self-governing colony.

The province under the B. N. A. Act, 1867, is a hybrid. So far as the Parliament of Canada has any control over its affairs, the province belongs to the first class. Its government is centred outside itself.

But so far as it is self-governed it belongs to the latter class. In both aspects its limits and rights are defined by the B. N. A. Act, 1867. One of its rights is the *dominium* under the Crown over its own land. Now this is the Province, and the only species of Province contemplated by the B. N. A. Act, 1867, or authorized to be established by the B. N. A. Act, 1871. The Par-

liament of Canada was authorized to construct no other. If it has constructed anything else, it is a monstrosity, and a province of Canada only in name. It is outside the provisions of the B. N. A. Act, 1867, and the Dominion having created it, is its Sovereign.

This is another *reductio ad absurdum.*

The Provinces of Canada are essentially colonies, except that they have relegated certain matters of common interest and right to a united body—The Dominion of Canada. Hence they are called not colonies, but Provinces. But in this way, "Province," under the B. N. A. Act, is a technical term, and wherever it is used it applies to the old as well as the new Provinces of Canada.

They are certainly self-governing Entities; and it is a constitutional fact that every such entity, whether it be called a Colony, a Province or a Nation, is invested with the *territorial dominium* over its land. A nation has the *Dominium Directum,* and a province or colony its *Dominium Utile* immediately under its Sovereign. Without this, neither nation, colony nor other self-governing entity can exist. Any of them that parts with it, disappears as a political entity, and becomes either fused with, or subordinate to, some other Sovereign authority.

The new provinces therefore have their land by virtue of their status. It is indispensable.

Then again section 117 of the B. N. A. Act, 1867, says: "the several Provinces shall retain all their respective public property."

This applies *in limine* to the Old Provinces. It applies also to the new. To create the new an area had to be demarcated in the Territories, and by statutory Enactment, established as a Province of Canada. The land itself in each case was the Province. For a moment—no matter how short and even while the paternal Government had its hand stretched out to snatch back what it pretended to give—that land was

the province, the "public property" of the province. And the B.N.A. Act, 1867, says it shall be "Retained."

Besides this section 117, section 109 of the B. N. A. Act, 1867, is even more elaborate and emphatic; and it applies to the new Provinces, *mutatis mutandis*, the same as it does to those named in it. This is not only the interpretation of the Act itself, but it is essential to preserve that equality among all the Provinces which is the radical fundamental of the Confederation in its formation, and no less emphatically so in its expansion—"the extension of the Dominion 'as constituted' under the B. N. A. Act, 1867, westward to the Pacific."

By Imperial statutory enactment, therefore, the new province has its land.

The power of the Parliament of Canada to Enact the contrary is discussed later.

III. Legislative Powers of Parliament.

(*a*) *Over the Territories.*

Under the B. N. A. Act, 1867, when the Territories became part of the Dominion as stated, the Parliament of Canada was invested with the same legislative authority over them, as over the other entities or provinces. Under that Act it had no other authority whatever, and it had emphatically none over their land, for that was exclusively reposed in the Provincial Legislatures.

The Territories had, however, as stated, no Legislature, and therefore though they had the right, they had not the machinery to exercise it.

Consequently the Parliament of Canada, being entirely responsible for forcing prematurely the Territories into this anomalous position, was charged with a Trust obligation by the Imperial Parliament to supply as far as possible the place of this non-existent Legislature, and the powers to perform that obligation were conferred on the Parliament of Canada, not by an

amendment of the B. N. A. Act, 1867, but by the Rupert's Land Act, 1868, and the Order in Council of the 23rd of June, 1870—two strictly territorial measures or instruments.

This was deliberately done so that the powers thus conferred could not operate as, or be mistaken for, an expansion of the constitutional legislative authority of the Parliament of Canada over its constituent entities, under the B. N. A. Act, 1867. The powers thus given were an entirely new function limited in time, area, and purposes. They were conferred to carry out a trust obligation, and their objects and purposes are, as they are in all cases of trust or delegated functions, of radical importance in ascertaining the extent of the powers. The powers always coterminise and harmonize with the purposes—never transcend them, however wide and general the language of the powers may be.

Happily the powers in this case were preceded by an address to the Imperial Government setting out the objects, as well as the purposes for which the powers were sought; and these objects and purposes were specifically made the "terms and conditions" upon which the Territories were admitted to the Dominion and the auxiliary Trust legislative powers conferred on the Parliament of Canada.

These objects and purposes are:—

(*a*) "That it would conduce to the advantage of the whole Empire if the Dominion of Canada constituted under the provisions of the B. N. A. Act, 1867, were extended westward to the Pacific coast."

(*b*) "That the colonization of the fertile lands and the development of the mineral wealth of the North-West, and 'the extension of commercial intercourse . . . from the Atlantic to the Pacific are alike dependent on the establishment of a stable Government for the maintenance of law and order in the North-West Territories."

(*c*) "That the welfare of a sparse and widely scattered population . . . already inhabiting these remote and unorganized territories, would be materially enhanced by the formation therein of political institutions bearing analogy as far as circumstances will admit to those which exist in the several Provinces of the Dominion."

And the powers granted for these purposes are:

(1) Under Rupert's Land Act, 1868—

"To make, ordain and establish within the land and territory so admitted . . . all such laws, institutions and ordinances and to constitute such Courts . . . as may be necessary for the peace, order and good government of Her Majesty's subjects and others therein."

(2) Under the Order in Council of 23rd of June, 1870:

"To legislate for the future welfare and good government of the said Territory."

Now there is nothing in these powers when read in conjunction with the purposes but what a legislature for the Territories, corresponding with a Provincial Legislature, might have done or carried out if it had existed.

"The colonization of fertile lands;" the "development of mineral wealth;" "the establishment of a stable Government for the maintenance of law and order;"—all in the Territories; and "the formation therein of political institutions analogous . . . to those which exist in the several Provinces of the Dominion;" and "to legislate for the future welfare and good government of the said territory."

These are all matters within the authority of all the Provinces of Canada, except perhaps the formation of the political institutions. If they, however, cannot form institutions, they can remould them, and out of the old material form them anew, so that, *mutatis*

mutandis, this authority is the authority of every Provincial Legislature.

For the Territories it was, *pro tempore,* exercised by the Parliament of Canada in the trust capacity, and this certainly did not serve to expand but to confine it.

A Provincial Legislature could not alienate, *en bloc,* its land and its territorial *dominium* over it, and still retain its status; and there is nothing here to authorize the Parliament of Canada to alienate the land of the Territories, or to appropriate it as a *res commune* of the Dominion, or to convert it to the use of the Dominion.

This nefarious thing, however, it did or attempted to do by its first Dominion Land Act, 1872.

Rupert's Land and the North-West Territories are therein defined as "Dominion Land," and laws are made relating to their sale and management. Ever since they have been dealt with as Dominion land, and they are contributories to the general revenue of Canada.

This is monstrous.

This enactment, be it remembered, is not made by any authority of Parliament under the B. N. A. Act, 1867. It is made under its Trust Powers conferred by Rupert's Land Act and the Order in Council. It is a Territorial, and not a Dominion Enactment. It is an act of spoliation; and the Parliament of Canada could not, any more than could a trustee in any affair of ordinary life, use its trust powers to appropriate as its own the property of its *Cestui Que Trust,* even under the pharisaical pretext that the plunderous act was in the highest interest of the beneficiary.

The Parliament of Canada must have passed this nefarious enactment oblivious alike of the B. N. A. Act, 1867, and of the patriotic, paternal, and pathetic proposals formulated by itself in order to get the Territories into the Union, and in reliance on which it was invested with the trust powers of the Rupert's Land Act, and the Order in Council—powers which instantly

it prostituted to accomplish an act of plunder against an undeveloped constituent of the Dominion to which it stood *in loco parentis.*

Neither under the B. N. A. Act, 1867, nor under the legislative powers reposed in the Parliament of Canada by Rupert's Land Act, and the Order in Council, was the Dominion Land Act, 1872, nor are any of its successors, legal or effectual to transfer or transform the lands of the Territories into Dominion lands.

(*b*) *Over the Provinces.*

New provinces within the Territories are established by the Parliament of Canada under a power conferred upon it by the B. N. A. Act, 1871.

This is an addition to, or an amendment of the B. N. A. Act, 1867; and this is a significant fact. It shows the keen conception the Imperial Government had of the difference between the high functions of the Parliament of Canada under its constitution, and the subsidiary Trust functions it had over the Territories under Rupert's Land Act, 1868, and the Order in Council of 23rd June, 1870.

The Parliament of Canada constituted Manitoba, as we have seen, under its subsidiary Trust functions, and the Imperial Parliament, when it saw what an egregious error had been made, promptly rectified it, not by augmenting the subsidiary Trust functions, but by conferring the right to establish new provinces on the Parliament of Canada in its constitutional capacity.

So that the new provinces established in the Territories are constitutional provinces. They are, the moment they arise, instantly free of the trust authority of the Parliament of Canada under Rupert's' Land Act and Order in Council; and they have their status and rights under the B. N. A. Act, 1867, quite independent of the Parliament of Canada which could neither augment nor deplete them, nor yet withhold them.

One of the exclusive rights of provinces under that Act is "to make laws in relation to . . . the management and sale of public lands belonging to the province."

They have never been divested of that right. It has fallen into abeyance because since 1872 it has been accepted as a fact that all of Rupert's Land and the North-West Territories are Dominion lands, and that the Parliament of Canada alone has legislative control over them.

I have shown the utter falsity and illegality of this preposterous claim.

The only Act that could give any countenance to this is the Dominion Land Act, 1872, and it does not even pretend to transfer the Territories to the Dominion. Nor does it enact that they are "Dominion land." It stops at designating them as "Dominion land."

This is not the enactment of a law by a Parliament. It is merely the utterance of an Oracle; and, *vanitas vanitatum,* quite as effectual. It no more changes the right of the ownership of the Territories than does the dubbing of a white horse black, change its color, or than does the writing of the name of a thief on a purse he has stolen make it his own.

It has been a misnomer all through the years to call the Territories "Dominion lands."

The provinces are part of those lands; and each province has its own land in the various rights I have previously set out.

The Parliament of Canada cannot divest the new provinces of those rights any more than it could the old provinces of Ontario and Quebec.

What then is the effect of the section in the various Acts establishing the new provinces that

> "all Crown lands, mines, minerals and royalties . . . shall continue to be vested in the Crown and administered by the Government of Canada for the purpose of Canada?"

It is simply *nullitas nullitatum*.

It is devoid of any species of authority.

It is contrary to the specific enactments of the B. N. A. Act, 1867.

It is repugnant to the whole scheme of the Confederation of the Dominion of Canada.

It is in direct violation of the trust powers reposed in the Parliament of Canada when the Territories were admitted to the Union expressly to "extend the Dominion as constituted under the B. N. A. Act, 1867, westward to the Pacific Ocean."

It is an attempt to capture the beneficial interest of the province in its own land, for the Dominion of Canada.

It is an attempt, without specifically changing the title of the Crown and the right of the province or even pretending to do so, to pervert or divert the beneficial interest of the province to the purposes of the Dominion by interposing a Suzerain in the shape of the Government of Canada over the lands of the province.

It is an atrocious scheme.

But cunningly as it has been laid out, the trickster's skill has failed to perfect the device. No authority is pretended to be conferred by the Act upon the Parliament of Canada to make laws relating to these lands. And nowhere is there any such authority—certainly not under the B. N. A. Act, 1867, and more certainly still not under Rupert's Land Act, and the Order in Council from the powers of which the provinces are emancipated.

The powers of the Provincial Legislatures over provincial lands are in full force, in spite of the enactment, and notwithstanding the fact that through the obsession of the public mind by this dastardly imposition, they have for many years been in abeyance.

Every enactment of the Parliament of Canada, and every administrative Act relating to provincial lands,

since the provinces were established, is utterly null and void.

What about all the titles granted pursuant to those Acts, or granted in any way by the Dominion Government?

I leave that till another time.

IV. Conclusion.

I submit now that I have clearly proved:—

(1) That Rupert's Land and the North-West Territories are not and never were the property of the Dominion or "Dominion land."

(2) That the title to them passed direct from the United Kingdom to the two entities which they constituted in the Dominion of Canada.

(3) That this title again, as Provinces were carved out, became vested in the Provinces;

(*a*) By the Constitution.

(*b*) By their status.

(*c*) By Imperial enactment.

(4) That under the B. N. A. Act, 1867, the Dominion had no authority over the land of these Territories any more than over the land of the provinces, except that by the B. N. A. Act, 1871, it was given an authority to divide them into areas and establish them as provinces of perfect equality with the other Provinces.

(5) That pending the attainment of this, and to facilitate and prepare for it, the Parliament of Canada was invested with certain Trust Powers of a limited legislative and administrative character.

(6) That these trust powers were in the interest of the Territories themselves in the same way as are the authorities of Provincial Legislatures.

(7) That these Trust Powers never extended to or affected the title of the Crown or the right of the Territories; and that it was in abuse of these powers the Parliament of Canada by a series of Enactments, beginning with the Dominion Land Act, 1872, converted

or perverted the Territories into "Dominion land," by merely describing them as such and administering them for the purposes of Canada.

(8) That these Dominion Land Acts are as regards the Territories:

(*a*) Fraudulent and void.
(*b*) *Ultra* all constitutional authority.
(*c*) In violation of Trust Powers.

(9) That the sections of the Acts establishing Manitoba, Saskatchewan and Alberta which divest those provinces of their land are:

(*a*) Utterly beyond the competence of the Parliament of Canada.
(*b*) Repugnant to the Constitution.
(*c*) In direct antagonism to specific enactments in the B. N. A. Act, 1867.
(*d*) In direct violation of the purposes for which the Territories entered the Union.

(10) That for the reasons stated, the sections named are *Nullitas Nullitatum,* and the lands and other Crown rights of each Province belong to the Province in spite of the contrary Enactment of the Parliament of Canada.

(11) That the legislative rights of the provinces over their lands under the B. N. A. Act, 1867, are in their integrity and full force in spite of the fact that so far they have lain in abeyance through misconceived credulity in the rectitude of the contrary claim advanced and persisted in, wrongfully, for years by the Parliament of Canada.

It is astounding that this monstrous device should have gone unexposed for so many years. It is a Governmental crime, which becomes positively loathsome when we reflect that it violates every one of the superb principles of justice, freedom and right which generated the Old colonies and evolved the Dominion of Canada as a herald, and only as a herald, of a splendid and sovereign Nation.

If at any time within the past two hundred years Great Britain or the United Kingdom had attempted to do with its colonies what the Dominion of Canada with its own constituents has doggedly and designedly done, the people concerned would have instantly revolted and hurled off a yoke at once abominable, tyrannic and extortionate: And let us reflect that while the Old Country had to design her propitious course through the mists of prevailing autocracy and oppression, the Dominion of Canada was born in the full effulgence of freedom, only fifty years or so ago. Yet Canada has reacted and recoiled, and substituted an anachronism of the feudal ages for the clean conceptions of the twentieth century in all matters of independent democratic government. It has not shrunk from protruding and interposing a Suzerain into the Confederation of Canada! And even a Grand Vizier!

Odious abominations of feudalism and autocracy!!

The course is clear now to the new provinces—Unitedly to rise and shake off the monstrous thing; and then compel its creator—the Parliament of Canada—to annihilate it.

There is but one word more. This is an article on our Constitution. It is not concerned with politics at all. But it has been said that when the provinces of Alberta and Saskatchewan were formed there was a compact made that the Dominion would retain the lands. I have shown clearly and conclusively the Dominion never had the lands, either to give or to withhold or to appropriate. But even if it had or supposed that it had, the law of the land, the constitution of the country, and the people of Provinces concerned demand an answer to this: Who were the parties to the alleged compact? It takes two parties to make a compact; but who was the second party to the compact by which the rights of the Provinces were bartered away to the Dominion of Canada, and the people of the Provinces despoiled?

The Provinces were non-existent. There was only the Dominion. The Parliament of Canada as a ruth-

less and avaricious autocrat might have said: "We will not exercise our discretion to establish you as provinces except upon the condition that you surrender your rights to the land in favour of the Dominion." An assent, extorted in this way, would be one of criminal duress. It would be worthless.

But quite apart from this, the Constitution which gives to each Province its land, and the exclusive right to legislate for it, could not without a revolution be waived or violated even by a unanimous vote of the entire people both of the provinces concerned and of the Dominion. Instead of a vote dissent and dissatisfaction have dogged the dastardly deed through all its malign manipulations.

Within the inner conclaves such a compact may have been made, but it was wholly abortive, and if made it stands as a monument to the eternal shame of its fabricators.

I have done. *Honi soit qui mal y pense.*

BRAM THOMPSON.

Regina, July, 1919.

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HALIFAXING THE JUDGES.

In the good old days there was a practice that endeared the "colonial" to the old-countryman, namely, to engage the latter at so many *f.* and when he had committed himself to the venture and had earned his first periodic stipend, pay him in pounds Halifax. This profitable form of jest had its vogue not only among cheap employers but in higher domains. We have known a Canadian University to Halifax a professor imported from Oxford.

We have in previous issues protested against the squalid ideas of remunerating judges that pertain in Canada as contrasted with other British Dominions. But it has remained for Hansard to reveal in our leaders of parliamentary thought a conception of the office of judge and an allowable chicanery in paying him that you could expect of a struggling commercial house in settling with a drummer or of the owner of a cheap office building in fixing the pay and privileges of his janitor.

We print here a *precis* of the proceedings and the reader will note that the speakers whose speeches rose above a huckstering level were unable to affect the result. In consideration of giving a paltry extra $1,000 the great boot of the iconoclast has kicked down the principle of fixed remuneration that it had taken our ancestors several centuries to erect as a bulwark of judicial independence.

JUDGES ACT AMENDMENT, BILL OF 1919.

Review.

For a long time the Western judges of first instance have realized that an unjustified distinction existed in the salaries paid to them, and to those of like jurisdiction in Ontario and Quebec.

Years ago the Chief Justice of the Manitoba Court of King's Bench brought this matter to the attention of the authorities, but without success.

The long years of the war bore heavily upon these Judges, but realizing that during that time of stress, any concerted action might embarrass the Government, they waited until the war was over, when the Judges of first instance of Manitoba, Saskatchewan, Alberta and British Columbia respectfully petitioned the Minister of Justice for an additional allowance of $1,000 a year to place them upon an equality with those of Ontario and Quebec.

The result was the Judges Act Amendment Bill—

See Hansard, June 28, 1919, p. 4350, *et seq.*

Salaries.

The proposed resolution placed all High Court Judges upon an equality, excepting those of Prince Edward Island, and those of Quebec, residing in smaller places; it provided an increase to $4,000 for the Judges of the County Court.

Pensions.

It further provided:

"That no annuity shall be granted to any Judge under the provisions of sections 19 and 24 of the Judges' Act relating to pensions and retirement unless the Governor-in-Council is of opinion that it is in the public interest that such Judge should resign his office. But this provision shall not apply to any Judge appointed before the coming into force of this proposed legislation."

DISCUSSION.

Mr. Meighen: "When I see so many hon. members desiring to rise, and being apprehensive that each of them is opposed to some feature of the Bill, I begin to think that I was not altogether unwise in endeavouring to shelve this measure until the return of the Minister of Justice himself. I have no anticipation that any possible re-arrangement of judicial salaries could be proposed to the House which would be acceptable all round. . . .

Then there was the question whether the salaries of the judges of the Supreme Court of Canada, having regard to the status of that Court and to its very great importance, were not inconsistent

with the dignity of that Court and the ability of the men who must have seats therein. But having regard to the fact that the primary cause of the action now being taken is the increase *in the cost of living and in the necessity* of enabling those whose salaries were on *the lower salary scale to maintain themselves and their families as they should be maintained, I thought that my best course was to increase the salaries of those who were on the lower scale, and not to touch those on the higher scale*, who, though not drawing what they did draw in former years, having regard to the increased cost of living, still were drawing sufficient to enable them to live in fair comfort. So I decided not to recommend any change in the salaries of the Judges in the higher Courts of Canada. But that remark should be qualified by one exception. The salaries of the Judges of the Higher Courts in the *Western Provinces and in the maritime Provinces had never been on a level with those of judges in similar Courts in Ontario and Quebec. Every year since I first came to Parliament it has been urged upon me most strongly that an undue discrimination existed there, that it should never have existed, and that it should be wiped away. I never felt that the argument was wholly sound. In the earlier and smaller stages of the commercial and population development of these provinces there was some reason for not placing the judges of their higher courts on a level, as to salary, with judges of similar courts in the larger provinces, the ground being, I take it, that the importance, the responsibilities, and, in general, the duties of incumbents of these courts were not so great or so onerous as was the case in the larger provinces. That must have been the ground; at any rate, it seems to me that it is not quite doing justice to truth to say that that ground never had any strength or foundation. However, whatever strength it may have had has diminished with the course of time and with the progress of these provinces. They have advanced in commercial development, and necessarily in the character of the cases that come before the courts, to such a degree as, I think, to justify equality of rank and salary with those of judges in Ontario and Quebec. Therefore, the concession has been made in this Bill of bringing the judges of the higher courts of those provinces, with the exception of Prince Edward Island, up to the same standard of salary as obtains in Ontario and Quebec.* . . .

The subject of income tax is one to which I have not given special attention in connection with this measure. The purpose of this Bill is not to raise a revenue but to increase the salaries of some of the lesser paid and more deserving judges of the country. It is true that by striking out a clause of the Judges' Act so far as it is applicable to those now receiving an increase of remuneration, an addition to the revenue could be made. But would that be fair? I see some objections to it; at all events there are some things that should be taken into account. If the income tax provision of the Judges' Act is made applicable from now on to all judges whose salaries are increased by the present resolution there will still be discrimination between those whose salaries are raised and put on a level with others and those whose salaries have always been at the level to which this former class approaches. I believe that the Income Tax Act which was passed this session provides that as to future appointments, judges shall be liable to that tax. It would

appear to me that whatever is done would be better done by amendment to the Judges' Act. I do not like the idea of selecting certain judges who are already on the Bench and making them liable to income tax while certain other judges who are on the Bench and who have received higher salaries all along are not liable. It seems to me that for all it is worth, it would give rise to certain heart-burnings on the part of those who have had the lower salaries all these years. At the same time I realize that the argument that has hitherto prevailed, namely, that to exact a tax after appointment, is in a measure a breach of faith, does not apply so strongly, if at all, to those whose salaries are at the same time increased. But chiefly for the reason that taxes are better dealt with by a Tax Bill, it occurs to me that the better way to arrive at the same result would be to make such amendments to the Income Tax Act this session or next session as may be considered equitable all round. . . .

Well, so far as breaking faith goes, it would be exactly the same under the Income Tax Act as under this Act. But I do not think there would be anything in the way of breaking faith, no matter how it was done. . . .

But by the Income Tax Act we take away an impediment already as regards future appointees; we simply state that notwithstanding this provision, the Income Tax Act shall apply in the case of future appointments. There is no reason why, if it is considered just, there should not be an amendment to provide that it should apply all round, or that it should apply in the case of all whose salaries were increased by the present Bill. What I argue is that it is better done by the Income Tax Act than by this measure.

Referring to the remarks of Mr. Fielding at 4372:—

The point, as I stated, was brought to my attention only last night, I think, and I have not had time to give it any thought since. I realize that what the hon. member says is right, that it would be impractical now to amend the Income Tax Act. That is quite true. But it could be done next session, and made applicable just the same, and there would be no difference whatever in the amount of the taxes collected. The question is only one of method. On principle, I am not opposed to the suggestion at all; I approve it; I do not think there should be any exception from income tax at all to judges or to anybody else; and the argument as to breach of contract makes little or no impression on my mind. . . .

It is very strongly argued, and I believe the argument has been conceded in the past, that though the word "may" is used, the effect is to give an absolute right of retirement on the two-thirds pension after the fifteen years, irrespective entirely of the public interest. The amendment therefore in section 11 is to the effect that no such absolute right shall hereafter accrue, but that in determining whether or not retirement may be permitted after fifteen years the Governor-in-Council may decide on the question of public interest alone. . . .

It has not been the practice of the past, because, I understand, the wording of the clause, as it has read in the past, gives the absolute right of retirement, the Governor-in-Council having no

discretion in the matter; that is, the judge himself can say whether or not he chooses to retire after fifteen years.

No reasonable objection can be made to repealing the clause as to exemption so far as it is applicable to judges whose salaries are raised by this Bill.

Mr. Fielding: Will my hon. friend propose such an amendment to this Bill?

Yes.

As I recall it, the Income Tax Act provides that it shall apply to the salaries of all judges appointed after the passing of that Act. The effect of the amendment will be to make the income Tax Act or any other tax or deduction imposed under any Act of the Parliament of Canada applicable to all judges whose salaries are increased by this statute.

The amendment I moved provides that that section shall not apply to any judge whose salary is increased by this Act.

The provisions of sub-section 3 of section 27 as to taxes and deductions shall not apply to any judge whose salary is increased by this Act.

The total effect of our action is to add to his salary. So far from breaking the contract we have added to the contract in his favour; that is all we are doing. Certainly the taxation that would be imposed on the whole salary would be a mere fraction of the increase we are giving now.

Mr. Proulx: I submit that there was no necessity for increasing the salaries of the Superior Court judges just now; they could have waited for another year at least, particularly in view of the finances of the country . . .

Personally I do not think that a judge should be allowed to retire from the bench after fifteen years' service if his health is good enough to permit him to continue to serve on the bench. If he is invalided or incapable of performing his duties on account of old age, he could be allowed to retire, but I submit that we should change the law so that no judge shall be allowed to retire and draw the retiring allowance after fifteen years' service, if he is in full phyiscal and mental strength.

The judges claim to be exempt from income taxation on account of constitutional limitations. We have passed an Act this session making judges appointed in future liable to income taxation.

Mr. Fielding: I presumed that these resolutions had been drafted before that, otherwise it seemed to me the suggestion was so natural and proper that the Minister would have provided for it. When the tax exemption privilege was embodied in the Judges' Act, there were no direct taxes imposed in this country, and consequently we were giving the judges no favour or consideration; there was no such tax to be exempted from. If at the time the Income Tax was applied it had been made to apply to judges as well, there really would not have been any very serious breach of faith, because you would not have been imposing upon them something in regard to which they had been previously exempted. But the view was taken, and I concurred in it myself, that there was some contractual relationship between Parliament and the judges,

as said by my hon. friend (Mr. Stewart); I was one of those who thought we should not interfere with the rights under that relationship, although some hon. gentlemen held a different view. However, another Income Tax Bill for the present year has provided that as respects all judges appointed hereafter, they shall be liable for income tax. That is a very proper step to take. Now I want to respectfully urge upon the Acting Minister of Justice that he has put a clause in this Bill that as respects all the judges whose salaries are increased by it, they shall not get the benefit of that exemption. If they have a vested right in the exemption, they have not a vested right in the increase, and I submit they should not have both the exemption and the increase. I therefore hope that before the Minister gets his Bill through he will insert a clause providing that as respects those to whom an increase of salary is given they shall not be exempt from income tax. Surely there can hardly be any division of opinion in that respect. I would like also to concur in the view, which the member for Prescott (Mr. Proulx) expressed with regard to the retirement of judges on pensions. There has been a good deal of fine pleading as to the meaning of the provision in the existing law respecting the retirement of judges. We all recognize that the basic principle of any pension to a public servant is that he is only entitled to a pension when he can no longer discharge his duties. When he has arrived at an advanced age—and that age is fixed at seventy-five—it might in fairness be said that he has a right to his retirement; but up to that time, so long as he is physically and mentally able to discharge his duties, *I claim he has no right to a pension at all. And, if he is to receive a pension to suit his convenience, or to suit some party convenience, or to make a place* for somebody else, all I can say is that that is an invasion of the true principle of a pension. I would therefore strongly urge the Minister to consider, in dealing with the annuity clause, making provision for the retirement of a judge when he reaches an advanced age, because only in such a case should a judge have any right of retirement unless he is physically or mentally disqualified for the performance of his duties. . . .

This is the right time and place to do this. It is a condition we attach to the increase of salary. I am not opposing the increase in salary; I am strongly of the opinion that the judges of the country should be generously paid, so that they may be able to uphold their dignity in the matter of their financial position and in other respects, and if the impression goes abroad that the judges of the country are going to be exempted from these burdens, we do not *increase the respect for the judiciary.*

Then he says: There will be discrimination. We have already discriminated in respect to the future, so that there is a good precedent. There will be some discrimination in any case. The judges whose salaries are not increased by this Bill will still be exempted from tax. I would be very glad to remove the exemption altogether, except that that would be regarded as a breach of faith.

I am bound to say that the Minister has given effect to my views. I can see no reason why we should tax one part of the salary and not the other. What we are doing is this: We are recognizing what somebody has called a contractual arrangement;

we are recognizing a vested right on the part of certain judges; we do not disturb that right, but we say that as respects judges whose salaries will be affected by this Act, we will remove the exemption. The Income Tax Act also declares that there shall be no exemption as regards judges appointed in the future. The net result will be that a few judges who are not affected by this legislation will enjoy the exemption, and until something happens by which we are doing something for them I am content they should have the exemption.

Mr. Levi Thomson: The present proposed salaries are not based on the high cost of living; if they were based on that, they should be very much higher. It is an outrage that the salaries have not been increased before this, and if any change is to be made, the increase should be greater rather than less. We are not going in the future to get the class of judges we want unless we pay them according to the services we expect them to render. If we expect to get the very best men, the only way to get them is to pay them properly. Even if the cost of living does decrease very greatly, the salaries will still not be any too high.

Mr. McKenzie: I fully agree with what the Minister of Finance says, that the statute governing the appointment of judges and their responsibilities, as far as contribution to municipal and other taxes are concerned, should be observed. In my opinion it is a very grave mistake for any person to think that it is all right to commercialize a judge like any other person in the country, and that he should be subject to the same commercial laws and conditions. A judge may be getting $8,000 a year, and a railway manager may be drawing the same salary, but the two positions are entirely different; and we would be sorry to suppose that the judge was not on a higher plane, as far as independence, mentality, and frame of mind in dealing with his business is concerned, as compared with the railway manager. I am not saying that the railway manager must not be a good man in every sense of the word, but the duties of a judge are of a peculiar cast. It has always been said that the law is a very jealous mistress, and that the man who desires to have a proper knowledge of the law and be able to apply it properly, is a man who gives his entire time, attention, and ambition to its study and its application. For that reason it is in the best interests of the country that certain safeguards should be thrown around the judiciary, not for the sake of the judge alone, but in the interests of the people in general. I am not only in favour of leaving the Judges Act as it is, but I am entirely opposed to this amendment, which will be drawing a line between the judge that will be appointed after this legislation is passed, and the judge that is now holding that exalted position.

It is the law that a judge is not subject to these exactions, and it should stay that way. I think it would be a pernicious distinction, and a highly pernicious system of legislation that the judges of the land who are to-day appointed and occupying these positions are exempt under the present Judges' Act, whereas the man who is appointed to-morrow, or any day after this legislation passes, shall be under a different law and different conditions entirely. I think it is entirely a mistake, and I hope that whatever law is enacted

in regard to judges, that they shall all be in the same position and subject to the same conditions. . . .

I realize this resolution is going to pass, but I wish to register my most emphatic protest against making this distinction between the judges. The Minister of Finance will find no precedence for it in England or France or the United States, or anywhere in the world. I wish to protest in a most emphatic manner against legislation under which three judges of the Bench will pay taxation while three others on the same Bench will be exempt, under which one County Court judge will be taxed while the judge sitting by his side will be exempt. I realize that I cannot prevent this resolution from passing, but I say it should not be passed. Whether men are judges of the Supreme Court or of any other Court in this country they should all be in exactly the same position with regard to taxation. It is pernicious taxation to tax the one and exempt the other. So long as the law is that they are subject to taxation, that law should prevail with regard to all the judges. . . .

We are absolutely repealing the exemption which judges are supposed to have. If it is distinctively understood that we are going back on our contract, I have nothing more to say, except that we did hold out in a most virtuous manner the other day that we should stand by that contract, and that there should be no "scraps of paper" in this country so far as we are concerned. But now we are absolutely scrapping that statute so far as its exemption provisions are concerned, and we are making the judges, whom we have exempted for the last fifty years, liable to taxation. We are breaking the contract we made with them. If that is the will of this Committee all right, but we must understand exactly what we are doing.

Mr. McMaster: If you take away the exemption, no one can say that the increase you are giving the judge will always be sufficient to take care of the taxation which you may impose upon citizens earning an income equal to his. If you take away the exemption he holds on $3,000 and give him $4,000 not free from taxation, it is possible that in the future he may be taxed at a rate which will take away, say, $1,500 from him, so that his salary would be really less by $500 than before you increased it. I do not say that that is a probable case, but it certainly is possible, and I think that in principle at least, the member (Mr. McKenzie) is right.

Bill reported, and read the third time and passed.

As indicated by Hansard the Draft Bill did not pass as printed. I have before me a copy of the Bill as it is assented to, and which was sent me by order of the Minister of Justice.

After some minor alterations to the printed draft, there is added a new section in the following words:—

"The provisions of sub-section 3 of section 27 as to taxes and deductions shall not apply to any judge

whose salary is increased 'by this Act by more than five hundred dollars.' ''

The latter part in quotation marks was an amendment of the Senate, which discovered that Mr. Meighen had taken from Prince Edward Island "more with the left hand than he had given with the right."

See Hansard, July 5th, 1919.

Mr. Meighen, p. 4811: The Senate has made two amendments to this Act. As both amendments have relation in a certain sense to revenue, and as on that account there might possibly be some doubt as to the propriety—I fancy not the constitutionality—of the amendments being made in the senate, I might explain that they were made at my suggestion. It will be remembered that at the last moment an amendment was made in this House providing that the exemption as to taxes and deductions that had been provided for in the Judges' Act should not apply in the case of any judges whose salaries were not increased by the Bill. I had in mind at that time that the increases of salaries were $1.000, and did not have in mind that in the case of Prince Edward Island there were three increases, two of them only for $300, and the other for $500. In the case of the $300 increase I fear we shall be taking out more with the left hand than we put in with the right, because the whole income is to be taxable. Consequently, the amendment that was suggested and was adopted by the Senate was to limit the class of judges whose salaries are now being made taxable to those whose salaries are increased by this Act by more than $500.

The other amendment made by the Senate has the effect of restoring the allowance for divorce for the judges in divorce in New Brunswick and Nova Scotia. As the Bill passed this House these allowances for judges in divorce were eliminated.

Special judges have been appointed, known as judges in divorce in these two provinces only. The reason the Bill was introduced and allowed—so far as I was concerned—to pass in that form was what I anticipated the passage in this House of the Divorce Bill, by which jurisdiction in divorce would have been given to all Superior Courts. Consequently, there was no reason why any special allowances should be made to any special judge for acting in divorce proceedings. But inasmuch as that Bill has not passed, there is no reason to justify the taking away of the salary that has always been paid to those judges for that work, because those judges alone have jurisdiction in divorce, and do all the work in divorce, as well as their share of the work of the higher court in other matters. Therefore the Senate restores the salary in each case to the judge of divorce in Nova Scotia and the judge of divorce in New Brunswick. The allowance to each is $500, just as in the past. The amendment makes the section read:—

"The first five lines of section 9 of the said Act are repealed and the following substituted therefor:" and so on.

By repealing only the first five lines the divorce allowance remains in the old Act.

Mr. McKenzie: There is another anomaly which I had hoped the Minister would observe. We did not touch the salaries of the Superior judges in Ontario and Quebec. Now the judges of the other provinces are on the same footing with those, but we have the anomaly that the judge in Manitoba pays income tax on the whole of his salary, and his confrere in Ontario pays nothing. This is an extraordinary condition.

Mr. Meighen: When the suggestion was first made it appealed to me to be of some force, though possibly not compelling force, but I was immediately answered by the member for Shelburne and Queens, to the effect that we had already passed the income tax, and made the salary of the judge appointed from now on taxable, while his confrere sitting beside him was receiving a non-taxable salary.

Mr. McKenzie: They should all be taxed or not taxed.

Mr. Meighen: I thought there was as much force in the answer as in the objection, and consequently I think it should stand at that. I move that the House concur in the amendments made by the Senate to the Bill.

Why Not Make the Judges Punch the Time Clock?

Our leading Parliamentarians having set the example of disrespect for the judiciary the game merrily proceeds. A judge is not to be able to obtain his cheque unless he files a statement. Moreover he has to stand to attention in the presence of the Auditor-General. That functionary has ruled that the judge's salary dates only from the date of his being sworn in; a ruling that bears hard against one judge who was overseas on active service when appointed. Why not treat his lordship in other respects also like a journeyman mechanic and make him punch the time clock?

Concerning the Dignity and Independence of a Judge.

Nevertheless the position of a judge cannot be estimated as that of another man. He is restricted in his friendships and in the exercise of social amenities. He can hardly be democratic and live with the poor and on the other hand he can hardly permit him-

self to eat at the same table with the most successful citizens, lest on the morrow they and their corporations should be in the Court before him. He must be silent on the discussion of public affairs even if the country appears to be going astray. He becomes a recluse and the endless study of the law consumes him body and soul to a fine ash.

In compensation of this the accumulated wisdom of our ancestors accorded him a degree of veneration and sought to exempt him from all forms of financial vexation, including taxes and contingent or diminishable remuneration.

That this judicial independence was not rapidly or suddenly arrived at (though in these days of cerebral flatulency it may be suddenly lost), we may learn from the following historical summary prepared by Mr. Justice Metcalfe of the Court of King's Bench of Manitoba on the occasion of some recent legislation by the Legislature of that province:—

JUDGES' SALARIES.

Judges have always been appointed by the King, under his prerogative; until the Act of Settlement, they were paid for the most part by fees; they were subject to dismissal at the pleasure of the Sovereign.

Speaking generally, when a judge refused to follow the dictates of the Law Officers of the Crown, he was summarily dismissed, as were those who decided in favour of the Seven Bishops; or like Coke, were thrown into prison. Small wonder is it under that system that only the servile and corrupt remained.

At the time of Elizabeth, a sheriff returned a panel, either according to express directions, or as to what he judged to be the Crown's intention and interest. (Hallam 172.)

James the First ordered Bacon (in the Peacham case) to confer with the judges one by one in order to secure their determination for the Crown. Coke objected that "such particular, and as he called it,

auricular taking of opinion, was not according to the custom of the realm."

In another instance, the King signified to Coke that he would not allow judgment until he had spoken with the Judges. Coke assembled the Judges, and certified to the King that they were bound by their oath not to regard instructions contrary to law, but to do the law notwithstanding. On *pain of dismissal* all the judges but Coke *fell upon their knees before their Sovereign* and acknowledged their error. (Hallam 246-249.)

In Hampden Habeas Corpus proceedings Heath, the Attorney-General, in effect, told the judges that they were placed there to obey rather than to determine (Hallam 274). Such treatment of the judges continued until, as Hallam says on page 321—"*that respect for the Courts of Justice which happy structure our judicial administration* has in general kept inviolate, was exchanged for *distrust, contempt and desire for vengeance.*"

During the reign of the Stuarts, and no less during the Commonwealth (when as Hallam says, interference with the Courts had never been done in so public or shameless a manner), matters had reached a state intolerable. The Sovereign either as *King* or as *Lord Protector,* had *forced the judges* to deal often unfairly and harshly with the populace. After the revolution, the people clamoured for and obtained an encroachment upon the Crown's prerogative, by which William *reluctantly consented* to a clause in the Act of Settlement, whereby the judges were to hold office, not during the pleasure of the Sovereign as formerly, but for life or good conduct, removable only upon the address of both Houses.

The judges' stipends were by the Act to be "ascertained and established." Later they became a charge upon the revenues granted for the use of Civil Government. George III., chap. 23.

The judges became thus privileged not for the benefit of the Crown, but at the urgent demands of the people and for their benefit, as they wished in the interests of justice that the judges should become *constitutionally independent.*

But the Crown still retains the prerogative of judicial appointments.

The British North America Act is a statutory agreement between the Sovereign, the Dominion and the Provinces.

In effect, it is a code.

The distribution of Dominion and Provincial powers is clearly defined.

None of the contracting parties may alter the contract.

Any change must be made by amendment of the constitution.

The English law as to judges is codified in its entirety in the British North America Act.

Under sec. 96—"The Governor-General shall appoint the Judges"—the Crown prerogative is thus retained in express terms. Under sec. 99, the Judges (as under the Act of Settlement) hold office for life, subject only to removal on the address of both houses, which must be founded on misbehaviour in judicial capacity.

By sec. 100 it is enacted that the Dominion shall pay to the judges, whom the Sovereign appoints, fixed salaries (as in England.)

It is therefore clear that it was the intention to codify the law as to the appointment and payment of the judges and that there can be no interference with the judiciary by any one of the contracting parties.

The matter has been similarly dealt with by the other great Dominions, South Africa and Australia.

The judge is appointed by the Governor-General in the name of His Majesty, and not by Parliament. The appointment contains the following words:

"Know you that reposing special trust and confidence in your loyalty, integrity and ability, we have constituted and appointed, and we do hereby constitute and appoint you the said———— to be a Judge of the Court of ———, with the style and title of Judge of ———, to have, hold, exercise and enjoy the said office of a Judge of the Court of ———— with the style and title of a Judge of ———— unto you the said ——— *with all and every the powers, rights, authority privileges, profits, emoluments and advantages unto the said office of right and by law appertaining during your good behaviour and your residence as by law required.*"

It has generally been conceded that the salaries thus determined are not subject to diminution by any one of the contracting parties.

In the Judges' Act the Dominion recognized that a "fixed" salary means one not to be diminished.

By sec. 27—Parliament enacts that the salaries and retiring allowances or annuities of judges shall be *free and clear of all taxes and deductions whatsoever which may be imposed by any Act of Parliament.*

It is generally conceded that the stipend of a Lieutenant-Governor should be exempt from taxation.

Our constitution, unlike that of England, is a written constitution. The law making power is divided into three parts:

1. The Sovereign (represented by the Governor-General.)
2. The Legislature (including Parliament).
3. The Judiciary.

1. The Legislature enacts.
2. The Sovereign's consent is necessary.
3. The Judiciary decides whether the Act is *intra* or *ultra vires,* construes the Statutes and creates and expounds the common law.

In the Province the Governor-General is represented by the Lieutenant-Governor and also by the Judiciary, both appointed under prerogative.

By sec. 60, the salary of the Lieutenant-Governor is fixed by the Parliament of Canada, and the Parliament agrees to pay the same.

No greater cause for exemption can arise in the case of the Lieutenant-Governor, than in that of a Judge.

The object of the provisions of the B. N. A. Act under the heading: "VII. Judicature" was to secure to the Canadian judges the same independence as that enjoyed by English judges under the Act of Settlement. This code is embodied in the B. N. A. Act, so that it cannot be disturbed by either the Parliament of the Dominion or any Legislature of a Province. Chief Justice Marshall, in giving judgment in *McCulloch* v. *Maryland* (4 Wheaton 316) said: "A power to tax is a power to destroy."

If the Province can impose a tax of one per cent. on a judge's salary there is nothing to prevent it from increasing the tax to fifty per cent. The Judge would therefore be under the power of the Province in so far as his salary is concerned. This would be a direct blow to the independence of the judges and would be in defiance of the clear intention of the above provisions of the B. N. A. Act.

While a judge stands upon a higher plane than does a civil servant, and while the law is more explicit in protecting the judge's stipend, yet even in the case of a civil servant there is a grave constitutional doubt as to whether the Province can either tax or authorize a municipality to tax the salary of a federal servant. The better opinion favours the negative.

In *Leprohon* v. *Ottawa,* the plaintiff, an officer of the House of Commons, contended that the municipality of the City of Ottawa had no power to tax his salary. 2 A. R. 522.

Chief Justice Moss at the trial found that the jurisdiction claimed for the local legislature did not exist.

On appeal to the Queen's Bench he took the same view with the majority of the Court (Morrison and Wilson, J.J.) contra. The Court of Appeal (Spragge, C., Haggarty, C. J. C. P., Burton, J. C., and Patterson, J. A.) unanimously upheld the Chief Justice: the grounds of their decision are set forth at length.

Spragge, C., at page 526, says: "There would moreover be an *incompatibility* between the actions of the *two authorities*. One, the Dominion Government, fixed the salary of a certain officer at a certain amount being, it is presumed, a proper compensation for the duties he is to discharge. Another authority, a provincial legislature, intervenes and reduces the amount, being, it is presumed, a proper compensation and does this in the case that I am putting in order to raise the revenue for provincial purposes."

Haggarty, C. J. C. P., at page 533, says: "Can this latter right be exercised on the salary of the Dominion officer, fixed by his Government? *If it can be at all, it can, of course, to an unlimited extent.*"

Burton, J.A., at page 541, says: "If the Provincial Legislature could not, for provincial purposes, impose a tax of this nature, *a fortiori they could not delegate such an authority to a municipal body for* carrying out the mere purposes of municipal government.

Patterson, A. J., at page 567, says: "Acting therefore upon the authority of the eminent American jurists, which has settled the question in the neighbouring republic, I hold that the imposition of the tax upon the plaintiff in respect of his salary was a matter which the *provincial legislature could not authorize without exceeding the authority conferred by the British North America Act.*"

The law there laid down continued to be the law of Canada until the case of *Abbott* v. *Saint John*, 40 S. C. R. 957—12 Am. & Eng. Ann. Cas. 821, in which the majority of the Supreme Court of Canada followed *Webb* v. *Outram* (a case from Australia).

In *Abbott* v. *Saint John,* the appellant was an officer of the Dominion Government in the Customs service.

Girouard, J., the dissenting Judge, at page 321 of the Ann. Case. report, refers to the fact that for at least twenty years the decisions of the Provincial Courts, following the Leprohon case, were accepted throughout the whole Dominion as being settled law. *He says that it is high time that the point involved should be carried to the Privy Council* in order to set at rest what is becoming now the unsettled condition of the Courts. He then reviews the cases in provincial courts and adds that he is not prepared to say that these cases are all wrong *until the Privy Council so declares under the Canadian Constitution.*

He further pointed out that the decision in *Webb* v. *Outram was severely criticised in the Law Quarterly Review,* vol. 23, pages 179 and 373; that it has given very little satisfaction in Australia; and that subsequently *the Australian Courts have refused to follow Webb* v. *Outram.*

Davies, J., at page 823, (Ann. Cas.) points out that in the case of Australia the general powers were carved out of powers which the provinces had previous to federation and given to the Federal Parliament, *the residuum of power remaining in the Provinces.* In Canada specific powers of legislation were given to the provinces and *the residuum of power was given to the Dominion.*

Idington, J., at page 825, says: "I am not at all clear that *Webb* v. *Outram* relied upon here and in the Court below, can be said, upon close analysis, to have very much to do with the question presented here;" he proceeds upon the ground that the Leprohon case was based upon an incorrect interpretation of the B. N. A. Act.

Duff, J., at page 827, without referring to the Outram case at all, says that "Judicial opinion upon the construction of the B. N. A. Act had swept a rather wide arc since the above case."

Webb v. *Outram* (1907), A. C. 81; and 7 Am. & Eng. Ann. Cas. 84, was a case where the Deputy Postmaster-General in the State of Victoria objected to taxation of his income. A full discussion of this case is contained in the judgment of Girouard, J., above cited, and in the Baxter case.

In the case of *Baxter* v. *The Commissioners of Taxation for New South Wales,* 4 Comm. L. R. at 1087 to 1194, *the High Court of Australia refused to follow the Privy Council's decision in the Outram case.* It was there pointed out that Lord Halsbury was labouring under a misapprehension of the Australian constitution, which like that of Canada, was a written Constitution; and that courts have full power to declare *ultra vires all* enactments not justified by the constitution. The Court applied its own previous decisions in *Deacon* v. *Webb,* 1 Comm. L. R. 585, and *D'Emden and Peder,* 1 Comm. L. R. 91.

The result of the Baxter case is that the salary of a federal officer was held not to be subject to an income tax imposed by one of the states of the Commonwealth.

It was there said that in *McCollough* v. *Maryl,* 4 Whet. 306, Marshall, C. J., laid down some principles and arrived at a decision in strict accord with the most authoritative pronouncement of English law. At page 1135, quoting Chief Justice Marshall's statement, that a power to tax is a power to destroy—it is stated that this statement is the foundation of Chief Justice Marshall's decision.

The American law following *McCollough* v. *Maryland,* was strongly relied upon by the Court of Appeal in Ontario in the Leprohon case.

American Rule.

See notes to *Webb* v. *Outram,* 7 Am. & Eng. Ann. Cas. 87. The decision in the reported case to the effect that the State may tax the salary of a federal officer is contrary to the decisions in the United States con-

struing the federal constitution. Thus it was decided in *Dobbins* v. *Erie County,* 16 Pet. (U.S.) 435, reversing Watts (Pa), 512, that *it was not competent for the State of Pennsylvania to levy tax upon the salary or emolument of an officer of the United States revenue service,* residing in Pennsylvania.

In *Collector* v. *Day,* 11 Wall. (U.S.) 122, affirming 3 Cliff, (U.S.) 388, 7 Fed. Cas. No. 3675, Mr. Justice Nelson said that the decision in the Dobbins case was "placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be interfered with by taxation or otherwise by the states, and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt.

On the authority of the Dobbins case, it was decided in *Parnell* v. *Page,* 133 N. Car. 125, 45 S. E. Rep. 534, that a state tax assessed and levied on the income received by the plaintiff from the United States as United States Judge for the Eastern Division of North Carolina, was illegal.

Compare *Melcher* v. *Boston,* 9 Mat. (Mass.), wherein the tax on the income of a clerk in the post office, appointed by the Deputy Postmaster-General, was held to be legal on the ground that the clerk was not an officer of the United States, in any such sense as would entitle him to the immunities from taxation which were adjudged to attach to the United States officer in the Dobbins case.

It was decided in *Collector* v. *Day,* 11 Wall. (U.S.) 113, affirmative, 3 Cliff, (U.S.) 376, that it was *not competent for Congress* under the Constitution of the United States *to impose a tax upon the salary of a Judicial Officer of a State.* The officer in question was a judge of the Court of Probate

and Insolvency for a certain county in Massachusetts; the salary was fixed, and was payable out of the treasury of the state. The Court said that the exemption of a state officer from taxation by the federal government stood upon as solid a ground and was maintained by principles and reasons as cogent as those which led to the exemption of the federal officer in the Dobbins case from taxation by the state, for in respect to reserved powers, the state was as sovereign and independent as the federal government. Continuing the Court said: "*It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states,* nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the *exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government whose means are employed in conducting its operations if subject to the control of another and distinct government, can exist only at the mercy of that government.*"

On the authority of *Collector* v. *Day,* it was decided in *Freedman* v. *Segal,* 10 Blatchf. (U.S.) 327, 9 Fed. Cas. No. 5080, that a federal tax on the income of a justice of the superior court of the County of New York, such income consisting solely of his salary as such, was illegal. The defendant attempted to distinguish the case of *Collector* v. *Day* on the ground that in that case the salary of a Judge was fixed directly by a statute of the state and was payable out of the state treasury, whereas in the case at bar, the salary was fixed by the board of supervisors of the County of New York, and payable out of the treasury of the City of New York, but the Court regarded the difference as of no importance.

In the matter of Taxation of Salaries, 131 N. C. 692, an income tax on judicial salaries was held to infringe a provision against the decrease of such salaries. The Court said: "*If the power to tax is*

conceded, the barriers erected by the constitutional limitation are swept away and one branch of the state government is placed at the mercy of another. If the general assembly has the power to impose a tax of one per cent. on the official salary of a judicial officer, on the same principle it could lay a duty which would cripple, if not completely paralyse, the whole system of the administration of justice in state tribunals."

See, to the same effect, *Com.* v. *Mann.*, 5 Watts & S. 403; *New Orleans* v. *Lee,* 14 La. Ann. 197.

With respect to a war tax levied in 1863 on the salaries of all federal employees, Chief Justice Tenney wrote to the Secretary of the Treasury: "*The Act in question, as you interpret it, diminishes the compensation* of every judge three per cent. If it can be *diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the Legislature.*

The only Canadian case affecting the taxation of a judge's salary is Judge Morson's case, found at 37 Ont., L. R. 369.

A motion for judgment in an action brought in a County Court to recover municipal taxes upon the judge's Judicial salary. The motion was referred to a Divisional Court, and it was held (Meredith, C. J. C. P., dissenting) *that the County Court Judge had no power to refer the motion, and that it should be dismissed.* The judgment, being on a technical point, is not an authority on the right to tax. The merits were not considered by the majority of the Court; but were considered by Meredith, C., in his dissenting opinion.

Riddell, J., at p. 371 says: "I had hoped that the suggestion made at the hearing of the court might be adopted and a judgment accepted *pro forma* that the case might be determined (as it should be) by the Judicial Committee. (See per Girouard, J., in *Abbott* v. *Saint John.*)"

Lennox, J., at p. 375 says: "The questions of law arising in this action are of very great importance, and it is in the public interest that a judicial interpretation of the B. N. A. Act touching these questions and binding on all the provincial legislatures should be obtained without unnecessary delay."

Meredith, C. J. C. P., at p. 380, says: "There is a good deal to be said on each side of the question."

It is nowhere suggested that a Judge as such ought not to resist unconstitutional taxation.

BY THE WAY.

The Seductive Office System.

The first stage of a lawyer's existence during Long Vacation is that of serene contemplation; which in the vulgar is termed "Lazying." But as old irritations become ironed out by the mellow warmth of the summer sun and vitality returns Mr. Lawyer becomes restless. There is a recrudescence of ambition which, like the stirring ambition in other walks of life, often leads to a resumption of activity in dangerous directions. The afflicted one becomes possessed of what the denouncer of Phillip of Macedon called "Philopragmasune," the love of doing things. In the absence of other attachable things the attention becomes directed to one's own law-office, its files, forms, dockets and debris. And just here we may observe that the allegorical apples of antiquity (Eden and Paris) were charming symbolisms of the temptation known as office-system.

A visit to the office of an old country practitioner fills us with the pride of system. We find methods of tape and tradition, the sedulous and turtle-paced engrossing clerk instead of the instantaneous and inaccurate typiste, the carefully negotiated interview and consultation instead of the brisk and equivocal telephone conversation. In our exultant hearts we say we have surpassed these effete and doddering methods of the old land.

Also, where our public, grumbling and bargain-hunting, pays us a dollar with reluctance the old country solicitor collects a sovereign (and the barrister condescends to accept a guinea) from awe-imbued and admiring worshippers of legal solemnity. Our new world systems have made hidalgos of the law-proud and poor.

Or he installs a bookkeeper who devises so highly civilized a system of accounting that when Mr. Lawyer wants to find where he stands he gives the bookkeeper a vacation and puts in an auditor.

There are enterprises that devise business systems, and some of these have revised a sufficient number of law-offices to be through with the chief blunders of law-office organization. On the whole it might pay a lawyer to stay on his vacation and subsidise one of these concerns to invent the new system. Which is much as if a man should hire an architect. He gets a better house; but he misses the fun of creation and that pride of mental parentage which says "a poor thing, but mine own."

The exacting forms of return which lawyers have to send in with regard to income under the various statutory schemes of war-taxation have led many of the profession to an involuntary recasting of their books. Formerly the lawyer felt that if he kept track of meum and tuum, his own and the clients; and held them sufficiently separate,—the rest was nobody's business. The present law makes for Bolshevism in the profession. When the lawyer is made to see for the first time how much of his intake goes for books and paper rather than boots and provisions, his old time contentment with existing institutions will slip a few cogs; and he may lose that happy-go-lucky disposition that has made the typical Canadian lawyer a good spender and a poor custodian and investor of his own private funds. He may become as remorselessly greedy as . . . . . [1]

[1] The reader may here supplement, according to his views, the words "the capitalistic plunderer" or "the insatiable labour agitator" or "the honest farmer." Or, if he has no modern mental disturbance but simply adds law to old-fashioned common sense, he may add the words "the victim of an expropriation."

CRIMINAL LAW AND A LIGHT HORSE MAGISTRATE.

Principles of the Criminal Law, by Seymour F. Harris, B.C.L., M.A. (Oxon.); 13th Edition, by A. M. Wilshire, M.A., LL.B.; Sweet & Maxwell, London; The Carswell Co., Ltd., Toronto. Recollections of a Police Magistrate, by Col. Geo. T. Denison, beginning in Canadian Magazine for July, 1919.

There have been many contributions to the subject of Criminal Law, but when a lawyer is reaching for the principles and not for the notes to a particular section in the Code he harks back to Harris. The 13th edition differs from the later editions of many other valuable books. For with age there is a tendency to run to a gouty and dropsical bulk, with the treatise disappearing in an adiposity of cases. The present editor of Harris has trained down and eliminated the obsolete matter of previous editions. The book has become at once more up-to-date and more readable. Always indispensable it is now more useable.

Coincidently with the issue of so scientific and learned a work as Harris we have had a contribution to Canadian literature which shows how all this science and learning may be dispensed with and the law of crime simplified as by a revolutionary tribunal. Col. Geo. T. Denison has exercised for the last forty years a control in the Police Court of Toronto, as unique as that of Diaz in Mexico. He is the Dean of the Aristocracy of Crime, makes for himself the rules of graduation and confers the degree. He says: "Sometimes in my club they will complain to me about the motor laws and the way in which they are administered.

"I always close the discussion by saying: 'Thanks to a kind Providence I have nothing whatever to do with motor cases. I deal with the aristocracy of crime, with murderers, highway robbers, forgers, embezzellers and all the highest class of criminals. I have nothing to do with the petty offenders who don't remove their snow or drive their motors too fast or commit other frivolous little offences, and I am very thankful, for my customers are much more pleasant to deal with; they rarely complain or bear any ill-will.' "

Visitors from other countries come to our Toronto Police Court as to a spectacle—the same visitors as frequent Juarez when there is a bull-fight. Most lawyers shun and cause their clients to shun this Court. And this is not because the Colonel is not honest, fearless and incorruptible—he is all these things—but because he is tranquilly and imperturbably lawless. We all knew this before, but did not like to say it. And had we wished to say it we should have fallen short of saying it half so well as the Colonel himself has written it.

We have said he is lawless. Now Criminal law, as any other law, is founded on precedent no less than on enactment. Listen to Col. Denison: "I never follow precedents unless they agree with my views. The men practising in my Court have known for years back that there was no use quoting precedents to me. It is very rare that cases are exactly alike, and the decision in one case might be right, while in another apparently like it, it would be unjust.

To save time I used to chaff lawyers wanting to read them, saying: 'Why read me another judge's opinion. If it agrees with my view, what is the object? If it takes a different view why should I follow another man's mistakes?' Sometimes I have had a lawyer quote some very prominent writer on some branch of law, as, for example, Russell on Crimes. After he had read the paragraph I would say: "Is that Mr. Russell's opinion?" "Yes," would be the reply. "Well my opinion is different." I was once told that he was the greatest authority on the subject. My reply was, "Well, I am sure he has not half as much authority in this Court as I have."

Magistrates, no less than judges, are expected to decide cases on the weight of evidence. The tribunal that disregards the weight of evidence is a lawless tribunal. Colonel Kirke, of Kirke's Lambs, Colonel Claverhouse and other distinguished cavalrymen have made themselves famous in this respect: their decisions were sudden and execution immediate. The dis-

tinguished author of the "History of Cavalry" lets us into the secret.

"I may also say that I depend upon an intuitive feeling as to a man's guilt or innocence and not to weighing and balancing the evidence. *I depend upon this feeling in spite of evidence,* and will subsequently give illustrations of the advantage of doing so."

We had always thought that intuitions were the prerogative of lovely woman. They are what help to make her socially entertaining and a terror in business affairs. Among men intuitions, gambler's hunches, premonitions, and the s. i. d (sense of impending disaster) are usually treated as symptoms of dietetic error. They are not elements of sane masculine judgment.

These "Methods of the Police Court" are a daily sport for our newspapers, some of whose readers no doubt in another age and country would have enjoyed the merger of the tiger and the Christian. The miseries of the poor are to the well-to-do a safe subject for grotesque humour. But the knife cuts rather deep. In the penalties it inflicts our Police Court is a formidable engine of justice or oppression. The Senior Police Magistrate of Toronto is no mere company commander when he holds office. "I doubt if there is any judge or magistrate, either in Canada or in England, who has tried as many indictable offences as I have in the last forty years, or had so wide an experience in the administration of criminal justice. In England the powers of the police magistrates are limited to six months' sentences. Mine, in some cases, extend to life sentences."

The Colonel makes much of this large experience as an equivalent of or rather a substitute supplanting the necessity for legal study. He decides—not hears—a great multitude of cases.

"As a matter of fact, my experience had been so great, and the cases so numerous, that a new point could hardly come up that I had not known all about long before, and had not time to spare for long argu-

ments by men trying to teach me what was already clear to me. I might state here that a few years ago, in reply to a request sent to him, I received from Sir Albert de Rutzen, the Chief Police Magistrate of London, a full statement of the cases dealt with by the police magistrates of that city. From it I find that there are fourteen Police Courts with two magistrates for each, and that 198,711 cases were tried or investigated in the London Courts in the year ending 13th December, 1913. This would be an average of 14,193 for each Court, or 7,096 for each magistrate. In the same year Mr. Kingsford and I had 39,654 cases, an average of about twenty thousand each."

But the knife cuts with a double edge. Nearly 20,000 cases a year thought out in the light of precedent and decided on the weight of evidence would make any man a redoubtable jurist. But among one score thousand cases decided on light-horse intuitions we shudder to think how many, many recruits may have been made to that aristocracy of crime which is a fungus and disgrace to our civilization. No criminal is so inveterate, irredeemable and utterly hostile to society as one whose own observations of the magisterial methods tell him that law, precedent and evidence have no place in the Court that convicts him.

These amazing revelations—we had almost said confessions—will be good reading for the Attorney-General of Ontario (if the administration of justice interests him at all). They should be not only Col. Denison's memoirs but also his valedictory.

THE LATE DR. ALWARD.

By the recent death in his 79th year of Dr. Silas Alward of St. John, N. B., the profession has lost one of its most scholarly members, and this periodical has lost one of its most esteemed contributors. We reprint an appreciation by the Saint John *Globe*:—

"By the death of Dr. Silas Alward, Saint John loses a citizen who for many years had been deeply interested in the highest development of the literary life of the community. A brilliant student, Dr. Alward was graduated from Acadia College in a class of men, many of whom attained to eminence. His M. A. was granted from Brown University, Providence, Rhode Island, two years later, and in 1882 Acadia, recognizing his attainments, conferred on him the degree of Doctor of Civil Law. He was also for a time a governor of Acadia and was, too, a member of the law faculty of King's College, Windsor. In his chosen profession, Dr. Alward won recognition and was created a Queen's Counsel. In the days of the old Mechanics' Institute, when the literary life of Saint John centred about the opportunities offered to the public by that institution, Dr. Alward was one of the presidents, and under his regime many eminent men lectured in the courses that were so prominent a part of its programme. He was, too, a member of the School Board. He conducted the lectures of the Law School at Saint John. Dr. Alward was also an ardent politician and made, in the warmth of his enthusiasm and his outspoken denunciation of those things that seemed to him to warrant criticism, an ideal representative for a free and democratic people. He was elected to the Provincial Legislature in 1887, a stormy time in the political history of New Brunswick, and was three times re-elected. Dr. Alward was essentially a student and a man of deep reading and wide research. Apart from the numerous contibutions made to the law journals, and to political

literature, he wrote many papers dealing with various aspects of literary criticism and appreciation. He was a life-long member of the Eclectic Club and of the Wednesday Evening Club, holding in both societies at various times the office of president. He was a fine speaker and as a lecturer made a success, whether dealing with law, with politics, or some of the many writers of English literature with whom he was delightfully familiar. He was a man of wide interests and was prominent for many years in all the forward movements of the city. During the war he was deeply interested in the work of those at home, and in contribution of his sons to active service had a strong link with the overseas work. While less bodily vigorous during the last few years, Dr. Alward retained a keen interest in all the progress of the city and gave the weight of his judgment and his opinion to the younger men who have followed in the pathway so finely developed by his long career as a citizen. He will be sincerely mourned by a large circle of intimate friends and by many to whom he stood for knowledge and courtesy, honor and friendliness."

WHERE SENTIMENT TURNED THE SCALE.

By request we reprint the following case which shows that sentiment is not without its value even in bankruptcy proceedings.

In re Delmonico's

(District Court, S. D. New York. January 4, 1919.)

BANKRUPTCY 249—RECEIVERS—CONTINUATION OF BANKRUPT'S BUSINESS.

Receivers in bankruptcy of Delmonico's, after operating the business for three months at an increasing profit, granted leave to continue the same until sale or appointment of a trustee.

In Bankuptcy. In the matter of Delmonico's, alleged bankrupt. On application by receivers for leave to continue business. Granted.

Mayer, District Judge. This is an application by the receivers, Maurice P. Davidson and Grosvenor Nicholas, for leave to continue the business of Delmonico's, now being conducted by them, until a sale thereof or until the election of a trustee.

These receivers were appointed by this Court on October 4, 1918. During the first month of operation, in October, the result showed a net loss of $10,000, in round numbers, on a total business of $39,000, in round numbers. November showed a net profit of some $9,500, on a total business of nearly $87,000, and December showed a net profit of upwards of $10,000, on a total business of $86,000, and it is estimated that the business for January, 1919, will show a substantial profit.

This encouraging progress has been accomplished by highly intelligent administrative effort on the part of the receivers, who have instituted necessary economies and have endeavoured to eliminate waste, while at the same time keeping the business up to its traditional standards, and, indeed, improving the service to the patronizing public.

During the operation of the business by the receivers, all rent and taxes which have accrued during

their occupancy have been paid. The business is substantial, and there are about 200 employees, many of whom have been at Delmonico's in one capacity or another for many years. "The Delmonico tradition of conservatism and excellence," the receivers state, has been "carefully preserved."

In addition to the gratifying results obtained by the application of good business methods, it is probably true that the business of this old-time restaurant has improved, to some extent at least, because of sentimental reasons. Delmonico's dates back to 1825, and was established about 1845 at what later became the site of the old Steven's Hotel at 7 Broadway. When croton water was introduced into the city, the occupants of the houses fronting on Bowling Green erected a fountain, consisting of a rough stone structure, over which the water was conducted by means of a pipe. The design called forth considerable adverse criticism from visitors from out of the city, and the incident and mention of Delmonico's are thus recorded by the poet John Godfrey Saxe:

"And now Mr. Brown
Was fairly in town,
In that part of the city they used to call 'down,'
Not far from the spot of ancient renown
As being the scene
Of the Bowling Green,
A fountain that looked like a huge tureen
Piled up with rocks, and a squirt between.
* * * * * * * *
And he stopped at an Inn that's known very well,
'Delmonico's' once—now 'Steven's Hotel';
(And to venture a pun which I think rather witty.
There's no better Inn in this Inn-famous city!)"

"(Note: The Greatest Street in the World—Broadway. By Stephen Jenkins, Knickerbocker Press.)"

About 58 years ago, in 1861, Delmonico's moved from the Bowling Green section to Broadway and Fourteenth street. In 1876 the next move was made to Twenty-Sixth street and Fifth avenue, and in 1897 the establishment again moved, this time to Forty-Fourth street and Fifth avenue, where it now is. These

moves of this famous restaurant mark the progress of the active life of the city as it gradually developed toward the north, although each move was attended with the usual foreboding prophecy that the location was too far uptown and ahead of its time.

Throughout these many years of existence, now rapidly reaching a century, the effort of Delmonico's has been to adhere to some simple and comfortable traditions. The theory is that the relation of host and guest still exists. Some of the well-known figures have gone, such as the white-haired John (quite typical), who, it is said, after three score and ten of a life of urbanity towards the patrons and thrift for himself, now spends a vigorous and happy old age on his New Jersey farm.

The guests still continue to have identity. He is respectfully, but cheerfully, greeted by name as he enters his favourite room or takes his favourite seat. While across the table he is discussing the affairs of the day, or closing a business transaction, or telling his tribulations to his lawyer, the waiter does not hover about, but approaches only when he is beckoned. In the quiet and dignified room in which at the end of the day busy men of the city are wont to dine with each other, one may hear oneself think as well as talk, without the din of the orchestra, and with only the occasional faint sound of the strains of music from the more pretentious rooms where those disposed to be more formal may gather.

In the banquet halls great and important addresses have been made at public gatherings by leaders of thought in their day and generation. Here, too, many young folk have gone forward into life with the good wishes of their relatives and friends. Within these walls the debutante has attended her first formal party, under circumstances different only as to time and dress from those which her mother and grandmother remember.

Throughout all these years, the effort has been to keep for the New Yorker and the visitor from else-

where a place of dignity and quiet, and to resist those innovations, some of which have resulted in eliminating the individual and depriving the patron of that individual attention for which at least some guests still crave.

Those who know this history and these characteristics have been loath to see Delmonico's go. It is their loyalty which in part, at least, has been responsible for possibilities of a future, and the hope (in which this court will assist) is that the business may continue, and go on, so that the institution may be kept alive, and not merely find its place on a page of some book reminiscent of New York.

Application granted.

OUR LONDON LETTER.

44 Bedford Row,
London, W. C. 1.
10th July, 1919.

The Editor,
"Canadian Law Times,"
Toronto.

SIR,—The most interesting event in legal circles during the past month has been the Prime Minister's announcement that the Allied Powers have decided that the Tribunal before which the Kaiser will be tried for his action in causing the violation of the neutrality of Belgium and Luxemburg shall be an Inter-allied one and shall sit in London. William II. will be tried by five judges, one appointed by each of the following Powers:—The United States of America, Great Britain, France, Italy and Japan. As the trial is to take place in London, the English judge will presumably be President of the tribunal, and gossip is busy with the names of possible judges.

The trial will be unique. There is no precedent for it, and the only parallel of any kind in modern times for the trial of a foreign sovereign on English soil is the case of Mary Queen of Scots. No date has yet been fixed for the trial, and no place has been assigned for it, though the choice will probably fall on the Royal Gallery of the House of Lords. It is generally accepted that the proceedings will commence during the winter months and be of a protracted nature. The ex-Kaiser will be permitted to select his own counsel and to call witnesses if he so desires.

Two Bills of the first importance have been introduced into the House of Commons by the Prime Minister. One deals with the Anglo-French Treaty, by which France is guaranteed against unprovoked agression by Germany. The guarantee given to the French Government by the British Ministers was expressly made subject to the approval of the Imperial Parlia-

ment, and the Bill is confined to the giving of such approval.

The other Bill deals with the general Peace Treaty. Legislation is needed to give effect to many of the financial and commercial provisions of the Treaty, such as those dealing with enemy debts and contracts of insurance. The Bill will be designed to confer the necessary powers for this purpose. These measures are exceptionally interesting from a constitutional point of view. It has for centuries been the accepted practice of our unwritten Constitution that the treaty-making power is vested exclusively in the Crown, acting on the advice of its Ministers, and that ratification by Parliament is not required. That practice is being followed in the case of the general Peace Treaty. A Bill is only necessary to give effect to those parts of the Treaty which provide for alterations in the municipal law. But the Anglo-French Treaty is being expressly laid before Parliament for formal ratification by statute, the first step in that open diplomacy between nations which is now being so strongly urged.

In addition to these important measures, the Government have ten first-class Bills in various stages of progress, including the Aliens Restriction Bill, the Finance Bill, the Government of India Bill, the Housing Bill, and the Ministry of Ways and Communications Bill, a highly contentions measure.

The Prince of Wales has been called to the Bar by the Inner Temple and made a Bencher of the Inn. There was an interesting ceremony. Lord Coleridge met the Prince on his arrival at the Hall of the Inn and escorted him to the Parliament Chamber, where a Special Parliament of Benchers was assembled. On the motion of Lord Coleridge, seconded by Lord Finlay, the Prince was admitted a student of the society and signed the admission form. Lord Mersey then moved, and Master Balfour Brown seconded, " That his Royal Highness the Prince of Wales be called to the degree of the Utter Bar," and the Prince of Wales signed the call-book of the Inn, thus becoming a bar-

rister. Lastly, Mr. Digby moved, and Lord Moulton seconded, "That his Royal Highness the Prince of Wales be invited up to the Bench," and this was agreed to. Thus within ten minutes the Prince went through a career which often occupies an ordinary individual twice as many years.

Three out of the four Inns of Court now has a member of the Royal Family on its governing body. The King is a Bencher of Lincoln's Inn, the Duke of Connaught and Prince Arthur of Connaught are Benchers of Gray's Inn, and Prince Albert, the King's second son, is a Bencher of the Inner Temple. The Inner Temple has perhaps the richest store of Royal associations. In 1601 Queen Elizabeth witnessed the performance of Shakespeare's "Twelfth Night" in the very Hall in which the Prince of Wales took his place at the Benchers' table; in 1671 Charles II. was entertained by the Inn, and in 1903 King Edward dined in the Hall, being the first reigning sovereign to dine in the Hall by right as a Bencher of the Inn.

The Judicial Committee have just delivered judgment in three Canadian cases of great constitutional importance: *In re The Initiative and Referendum Act*, an appeal by special leave from the judgment of the Court of Appeal of Manitoba, it appeared that by an Order-in-Council the Lieutenant-Governor of Manitoba referred to the Court of King's Bench for Manitoba the question whether the Legislature of that province had jurisdiction to enact the Initiative and Referendum Act (6 Geo. 5, c. 59, Man.), and a further question whether there was jurisdiction to enact specified sections of that Act. The Act in question contained elaborate provisions by which, shortly stated, it was provided that laws might be made and repealed by the direct votes of the electors of the Province. Upon the consideration of the questions coming before Mathers, C.J., the learned judge answered both questions in the affirmative. The Court of Appeal unanimously answered both questions in the negative, and the case was taken to the Judicial

Committee. Viscount Haldane, in delivering the judgment of the Judicial Committee dismissing the appeal, said that the language of the Act could not be construed otherwise than as intended seriously to affect the position of the Lieutenant-Governor as an integral part of the Legislature under the British North America Act. Further, it was doubtful whether under sec. 92 of that Act a Provincial Legislature could create and endow with its own capacity a new legislative power not created by the Act.

Although the question decided in this case was strictly one of the construction of the British North America Act, 1867, the judgment of the Judicial Committee has a wider implication. It is based on the constitutional doctrine that the ultimate authority in British countries is the Sovereign in the Legislature. The Bill passed by the Manitoba Legislature purported to give to the electorate authority to initiate and sanction legislation without reference to the Legislature, or to the Lieutenant-Governor, the King's representative in the province. The Judicial Committee have now decided that this is unconstitutional, because the Act of 1867 embodies the normal British practice of requiring the assent both of the Sovereign and of the Legislature before an Act can become the law of the land.

The other two cases dealt with the jurisdiction of Provincial Courts to decree dissolution of marriage. In *Walker* v. *Walker* the respondent petitioned the Court of King's Bench for the Province of Manitoba praying that her marriage might be declared null and void. The petition was dismissed for want of jurisdiction, the judge being of opinion that since the Court had not previously exercised jurisdiction in matrimonial causes, the jurisdiction, if it existed, ought to be declared by the Court of Appeal. Upon appeal to the Court of Appeal for Manitoba that Court unanimously reversed the decision and remitted the petition for hearing. The appeal to the Judicial Committee was dismissed. Viscount Haldane, in delivering the

judgment of their Lordships, reviewed the material legislative enactments and referred more particularly to the Dominion Statute, 51 Vict. c. 33, s. 1, which provides that, subject to certain exceptions and modifications which were not material, " the laws of England relating to matters within the jurisdiction of the Parliament of Canada as the same existed on July 15th, 1870, were from the said date and are now in force in the Province of Manitoba." The Matrimonial Causes Act, 1857, did not merely set up a new Court to regulate procedure, but introduced a new substantive law giving a right to divorce *a vinculo matrimonii* for specified causes. That statute and the amendments of it made before July 15th, 1870, were accordingly in force in Manitoba. Judisdiction to apply the law so introduced was given to the Court of King's Bench by the Manitoba Statute, 34 Vict. c. 2, and subsequent statutes of the province. In the opinion of the Judicial Committee the case was indistinguishable from the well-known case of *Watts* v. *Watts*.[1]

In the other case (*Board* v. *Board*) the Supreme Court of Alberta, Appellate Division, had held that the Supreme Court of Alberta had jurisdiction to dissolve marriage. In delivering the judgment of the Judicial Committee dismissing an appeal from this decision, Viscount Haldane pointed out that as in *Walker* v. *Walker*. (*supra*), the Matrimonial Causes Act, 1857, introduced a new substantive law in England. The effect of sec. 3 of the Dominion Statute, 49 Vict. sec. 25, was to bring that law into force in Alberta. Their Lordships were of opinion that the Supreme Court of Alberta Act (7 Edw. VII. c. 3, Alb.), gave that Court jurisdiction; in any case that Court had jurisdiction, since the right existed when the Court was instituted, and the Court was not expressly deprived of jurisdiction in the matter. These two decisions are interesting as drawing attention to the extraordinary diversity of the law of divorce throughout the Empire. The whole difficulty seems to have

[1] [1908] A. C. 573.

arisen from a lamentable want of precision in the statutes by which the local Courts in Canada were created. Further, these cases are excellent illustrations of the dangers attendant on the increasing tendency to legislate by reference.

Lord Birkenhead having, with the permission of the King, arranged to attend a reception to be given by the judges and the Bar of Belgium during the present month, the Great Seal is to be placed in commission during his absence, and Lord Curzon, Lord Haldane, Lord Buckmaster, Lord Finlay, Lord Reading, and Lord Sterndale have been appointed as Commissioners. The last occasion on which the Great Seal was placed in commission was in 1913, when Lord Haldane crossed the Atlantic to deliver an address before the American Bar Association. It seems to have become the practice to place the Great Seal in commission only when the Lord Chancellor leaves the Kingdom for the purpose of attending some function in his official capacity. Lord Loreburn paid a private visit to America during his occupancy of the Woolsack, and Lord Birkenhead went to France soon after he became Lord Chancellor, but on neither of these occasions was it deemed necessary to appoint Commissioners.

The Annual Report of the Law Society recently issued shows that altogether during the war 3,324 solicitors and 1,485 articled clerks joined His Majesty's Forces. Of these 588 solicitors and 358 articled clerks have given their lives in the service of their country. Military and naval honours have been awarded to 443 solicitors and 214 articled clerks. It is interesting to note that since the signing of the Armistice a number of American and Dominion law students serving in the forces have been attending the lectures at the Society's School of Law.

Yours, etc.,

W. E. WILKINSON.

LEGAL FICTIONS

THE APPEAL TO CAESAR.

MARVIN LESLIE HAYWARD.

The heavy iron gate of St. Agatha's Hospital clanged behind him, and Fraser MacKenzie walked slowly up the elm-shadowed street. His heavy shoulders drooped dejectedly, and the fighting spirit that had made him the terror of the local bar had apparently deserted him.

"Poor old John," he mused, "and there isn't a thing I can do. The big corporations have everything their own way. God, its monstrous."

He walked on to the end of the street, and turned a corner, his eyes still fixed on the sun-flecked pavement. A shrill whistle and a stream of workmen pouring from a wide gate on the opposite side of the street reminded him that he was in the immediate vicinity of the main plant of the Denham Manufacturing Corporation.

"It can't do any good," the lawyer assured himself, "but by Heavens, I'm going in and put it up to Denham," and he plunged across the crowded street.

Five minutes later he was admitted to President Denham's private office, and immediately stated the nature of his business.

Denham calmly chewed the end of a cigar, big, black and typical.

"We admit no liability in the matter," he declared firmly.

"What a d——— pirate you are," retorted MacKenzie. "I could admire your methods if I had no more conscience than you."

"That's our reward when we abide by the laws of the land and endeavour to give a fair day's pay for a fair day's work," Denham expostulated, as he held

up a pudgy and deprecating hand. "The moment we rely on our legal rights to protect our stock-holders, some eccentric and dilettante lawyer like yourself rushes in and makes some mild but galling references to our personal character."

" 'Abide by the laws of the land,' and your 'legal rights,' " snapped MacKenzie. "Honestly now, is there any moral, municipal, State or Federal law that your corporation hasn't broken till it looks like a powder plant with a Hun foreman?"

Denham rolled his cigar to the other corner of his mouth, and assumed his "strike committee" air.

"Appeal to the Courts, then," he suggested piously.

"Appeal to h—— to discipline the imps and you'll get about as far," the lawyer retorted. "But we're getting away from the case we were discussing."

"Yes," agreed Denham, "and it's a fine example of the point I am making. Yes, as you were saying, John Harding was, up to the fifteenth day of the present month, a faithful and valued employee of ours."

"And now he's an inmate of the 'hopeless ward' in St. Agatha's Hospital, and'll be dead inside of a week," declared MacKenzie, " a victim of your damnable corporate system—a burnt offering to capitalistic greed and a woeful commentary on the rank injustice of the existing law."

"Save your harangue for the Court-room," sneered Denham.

"I'll get you there some day," maintained MacKenzie, "and when I do I'll show up your injustice to your luckless employees in a way that'll open the eyes of the people, although I'll admit you are no worse than the average incorporated bandit," he added.

"Thanks," was the dry retort, " and your remarks to the 'dear gentlemen of the jury' will no doubt make interesting headlines. You appear to be warm enough over the Harding case, at any rate,"

"Good God, man, why wouldn't I be?" blazed MacKenzie. "John Harding was one of my boyhood friends. When half through college he left to assume the support of an invalid mother and a crippled sister. He gave up his ideal of becoming a civil engineer and became an ordinary day labourer in your plant."

"And a good one, too," smirked Denham.

"He was engaged to one of the sweetest and best girls that ever lived," MacKenzie went on, " but he would not ask her to share his home, burdened as he was with his own cares. Then, when his mother and sister died, he felt that he was too old to complete his education, and was too proud to ask the girl to marry an ordinary mechanic like himself."

"Am I responsible for that?" goaded Denham.

"Then came the accident in your plant, and——"

"Yes," interrupted Denham, " as you say, Harding was injured in our plant, fatally, I am sorry to say, and in consequence you come here and proceed to abuse me."

"When I demanded compensation for his death, didn't you tell me to go to h——?"

"Why not?" smiled Denham. "The whole question comes down to this, and you're lawyer enough to grasp the point, surely. Harding was injured while in our employ. The Workmen's Compensation Act of this State provides that if a workman is fatally injured and leaves 'dependents,' the employer may be compelled to pay those 'dependents' a certain cash compensation. Am I not right?"

"You are."

"Now, in Harding's case, unfortunately for your contention, Harding was alone in the world and left no ' dependents' whatever. As you have said, he was unmarried and his mother and sister who were supported by him, had both died before the accident. It follows, therefore, that as Harding left no 'dependents' within the meaning of the Workmen's Com-

pensation Act, he does not come within the protection of the law, and we are under no obligation to pay."

"You don't deny that the accident was due to your own carelessness?" interrupted MacKenzie.

"As you have no case against us under any circumstances, I am perfectly free to admit that you are correct," agreed Denham.

"And you will also admit that you are morally bound to pay?" persisted MacKenzie.

"We will do all that we are legally bound to do, and no more," declared the other.

"And then you protest when I call you a d—— pirate," sighed the lawyer.

"Criticise the law, not me," replied Denham, "and a lawyer like you who puts in his time studying out loopholes in the law to get around cases just like this ought to be able to see a way out. You pride yourself, I've heard, on taking no case unless your client is in the very right of the matter and has absolute justice on his side."

"I do," declared MacKenzie, as he rose to go, "and I'm not through with this case yet."

"Go on," was the parthian taunt; "we're ready for you."

Back in his office, MacKenzie paced back and forth moodily, and admitted that Denham's confidence was well founded. The facts stared him in the face like the proverbial stone wall.

By the old common law, if an employer by his carelessness caused the death of an employee, the relatives of the latter had no redress. Then the Workmen's Compensation Act of the State provided that if an employee were killed under certain circumstances, and left dependents, the employer could be compelled to pay damages.

"And left no dependents." There was the pitfall; for Harding would leave no "dependents" whatever. The Workmen's Compensation Act would not,

therefore, apply; and he would be driven back to the rules of the old common law under which there would be no case against the Denham Corporation under any circumstances.

But, surely, he told himself, here was a case where the cold rules of the law must yield to plain natural justice. It was monstrous that a cynical President of a soulless Corporation could commit industrial murder and laugh at the just claim of the dying employee.

As Denham had said, MacKenzie had always prided himself on taking no case unless his client were morally entitled to a verdict, and he had claimed that no matter how hopeless a case looked from a legal standpoint, it was generally possible to find some flaw in the existing law that would enable him to win.

"I guess this is the impossible case where injustice triumphs," he told himself bitterly. "Poor Harding," he mused. "Devoted his life to his mother and sister—gave up his chance of marrying Laura Blackmore, and now—"

He stopped suddenly, his indignant fist poised in a gesture of furious protest, and a new light broke over his gloomy Scottish countenance.

"Holy Saint Andrew," he exclaimed; and five minutes later he was on his way to St. Agatha's Hospital.

"He's failing all the time," the little nurse whispered, and four days later John Harding's body was laid away in a quiet corner of a quiet little cemetery. Fraser MacKenzie and Laura Blackmore were the only mourners to follow the hearse through the bustling, careless streets.

And why not? After all Harding was merely an ordinary American mechanic working for ordinary wages, and the loss of one cog from the industrial mechanism of the Denham concern caused no stir. The city was munition mad, and the Denham Corporation was paying a quarterly dividend of sixteen per cent.

Inside of a month, however, MacKenzie entered suit against the Denham Corporation claiming $20,000 damages for Harding's death and the newspapers began to write up and take notice. MacKenzie had won some surprising cases, and the Denham Corporation employed more and better lawyers and appealed their cases farther than any other company in the State.

At the next Session of the Supreme Court, the case come on for trial, and the opening of the legal battle itself was a neat little tableau which the reporters described very effectively.

MacKenzie sat silent and alone on one side of the long attorney's table, while Denham faced him, surrounded by an array of legal talent worthy of an international arbitration, There were Senator Jamieson, of national reputation; Arthur H. Hollins, the keenest cross-examiner in the State; old Isaac Winslow with the face of a saint and the tongue of a devil; "Sweet William" Pardee, the "jury stuffer;" and others, less famous, but young, ambitious and formidable.

"You're sure MacKenzie hasn't anything up his sleeve?" whispered the Senator. "He's an eccentric cuss, but he stumbles on some d—— awkward points sometimes."

"How can he?" retorted Denham. "I know positively that Harding didn't leave a relative or dependent on earth."

"That's good enough," nodded Jamieson. "It's almost too d—— easy, though," he told himself.

"*The estate of John Harding, deceased,* versus *The Denham Manufacturing Corporation,*" said Judge Knowlton. Mr. MacKenzie for the plaintiff."

MacKenzie rose and addressed the Court.

"I will call Laura Harding as my first witness," he announced calmly.

"Who in h—— is she?" snapped Jamieson in a furious undertone.

"Haven't the slightest idea," admitted the puzzled Denham, and a buzz of comment hummed along the Corporation side of the table. "Our detectives traced out all his relatives as far back as fourth cousins," Denham assured the Senator as he plucked at his sleeve a trifle nervously.

A pale little woman, dressed in the customary black, rose from a front seat, went forward, was duly sworn, and took her seat in the witness box.

"Your name is Laura Harding?" began MacKenzie.

"Yes."

MacKenzie's next question raked his opponent's position from end to end.

"You are the widow of the late John Harding?" he queried calmly.

"Yes."

"You were Laura Blackmore before your marriage, were you not?"

"Yes."

"That is all, your Honour," MacKenzie announced, took his seat, and began sharpening his pencil.

Denham was pouring a flood of excited comment into the Senator's ear.

"MacKenzie told me when he came to demand damages for the accident that Harding never married," he declared.

Jamieson shook off his spluttering client and rose to cross-examine.

"When were you married?" he began suavely.

"On the eighteenth of last month," replied the witness.

"That was after the accident to the late Mr. Harding?"

"Yes."

"That is all."

"That closes my case," MacKenzie announced, and again devoted his attention to his pencil.

"May it please your Honour," began Jamieson, it appears by the evidence of the witness that her marriage to Harding occurred after the accident that was the cause of his death, and that, I submit, does not constitute her a 'dependent' within the meaning of the Workmen's Compensation Act, so that the plaintiff cannot, therefore, recover."

"Why not?" queried the Judge. "I admit that the point is a new one to me, but there is certainly a chance for an argument either way."

"Simply because the law says that if a workman leaves 'dependents' his estate may recover compensation," Jamieson argued, "otherwise, not, and 'dependents' as used in the Act must be taken to apply to the 'dependents' of the workman at the time of the accident causing his death, and not to those which he might acquire by marriage or otherwise between the date of his accident and the time of his death."

"There might be something in that," admitted the Judge.

"If not," Jamieson went on, "the Compensation Act would be a dangerous weapon in the hands of designing women who would attach themselves to injured workmen for the sole purpose of collecting compensation after the death of the workman. Besides, it opens a wide door to the schemes of designing attorneys," he added, "who would advise clients to carry out such schemes when the parties themselves would not think of it."

"If my learned friend is making any insinuations along that line I am free to admit that that is just what I did," smiled MacKenzie. "There are more ways of getting even with a dishonest corporation than by abusing them in the newspapers."

"The Senator's argument sounds reasonable, I must admit. Have you any authorities to support your argument, Mr. MacKenzie?" queried Judge Knowlton.

MacKenzie rose and opened a new and bulky volume.

"In the late case of *Crockett* versus *International Railway Company*, recently decided by the New York Courts, and reported in 162 New York Supplement, page 357," he began, "it is laid down that the widow of a workman whose death resulted from injuries in the course of his employment was entitled to damages, though her marriage to him occurred between the date of his injuries and that of his death. I presume," he concluded, "that my learned friends will admit that the law as laid down by the Courts of the State of New York is at least as good as the opinion of the learned Senator on the other side."

The army of eminent counsel on the other side of the table gazed blankly at the heavy, impassive face of Senator Jamieson.

"That volume of the reports just came out the other day and I haven't had time to open it," Pardee whispered to his right hand neighbour. "It's another one of MacKenzie's uncanny stunts."

"Would you kindly let me look at that case, Mr. MacKenzie?" said the Judge.

The venerable clerk handed up the volume, and, while the Judge was earnestly scanning the case of *Crockett* versus *International Railway Company*, Jamieson leaned across the narrow table.

"Withdraw the case and we'll settle," he said. "We can't afford to be beaten in open court."

"And the widow can't afford to settle for less than the $20,000 I sued for," replied MacKenzie calmly.

"We'll pay it," Denham broke in, "but it's d—— highway robbery, that's what it is."

"Oh, no," smiled MacKenzie, "I simply followed your valuable advice and appealed to the Courts, that's all."

AMERICAN VIEWS OF THE RIGHT OF SEPULTURE.

Laws with respect to human burial and the right to the body are among the oldest of human institutions. In ancient Egypt the corpse of the father might be hypothecated by the son in order to borrow money. In continental Europe in the Middle Ages the creditor could seize the dead body of his debtor. In England the corpse became a subject of "ecclesiastical cognizance."

Mr. R. P. Taylor has attempted in the American Law Review to set forth the law as generally understood in the United States.

The following extracts would seem to indicate that the law could be reduced to something like uniformity:

In 1856, Samuel B. Ruggles, as referee for the Supreme Court of New York, filed a report (4 Bradf. 503), which has been said to be the most accurate and elaborate collection and statement upon the subject of burial yet published. Commenting upon the asserted exemption from liability of one guilty of negligence in the disposition of a corpse, the report says:

"It will be seen that much of the apparent difficulty of this subject arises from a false and needless assumption in holding that nothing is property that has not a pecuniary value. The real question is not of the disposable, marketable value of a corpse, or its remains, as an article of traffic; but it is of the sacred and inherent right to its custody, in order to bury it and secure its undisturbed repose. The dogma of the English ecclesiastical law that a child has no such claim, no such exclusive power, no peculiar interest in the dead body of its parent, is so utterly inconsistent with every enlightened perception of personal right, so inexpressibly repulsive to every proper moral sense, that its adoption would be an eternal disgrace to American jurisprudence. The establishment of a right so sacred and precious ought not to need any

judicial precedent. Our courts of justice should place it at once where it should fundamentally rest forever, on the deepest and most unerring instincts of human nature; and hold it to be a self-evident right of humanity, entitled to legal protection by every consideration of feeling, decency and Christian duty."

The final conclusions reached in the above-mentioned report of Samuel B. Ruggles are as follows:

"1. That neither a corpse nor its burial is subject in any way to ecclesiastical cognizance nor to sacerdotal power of any kind.

"2. That the right to bury a corpse and to preserve its remains is a legal right, which the courts of law will recognize and protect.

"3. That such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin. (In 14 Am. Law Rev. (Vol. 1, N. S.) 62, it is said that Mr. Ruggles added a note to the original report in explanation of the term 'next of kin,' stating that it was not employed for the purpose of denying or questioning the legal right of a surviving husband to bury his wife's remains or to reinter them if disturbed. *Per contra,* as held in *Hackett* v. *Hackett,* 18 R. I. 155, 26 A. 42, 49 Am. St. Rep. 762, 19 L. R. A. 558, the corresponding right of a surviving wife may be asserted.)

"4. That the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture and to change it at pleasure."

In general these conclusions are sustained by the adjudications of American courts. The fourth conclusion must be accepted, however, subject to a modification similar to that already observed as attaching to the third: The right to change the place of sepulture may be made inoperative by the peculiar circumstances of a given case.

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CRIMINAL PROCEDURE.

(Editorial Note: The following article is an expression of the general feeling of unrest which exists within and without the Profession in regard to the administration of the Criminal Law. The sentiment of the age is to break up any conditions that favour the growth of "classes"; and the most undesirable of all classes is a criminal class. There is no doubt that while our actual Criminal Law is much less barbarous than that of our ancestors, the administration of that law is about in the same position as it was in the days of that illustrious magistrate and author Henry Fielding. It is obvious to any practitioner that a criminal class is being steadily recruited by the procedure in our unhappy-go-unlucky police courts. We shall welcome any suggestions as to the improvement of Criminal Law administration.)

CRIMINAL APPEALS.

The criminal is, like the poor, always with us. It is taken for granted that a criminal gets a fair trial. At any rate he leaves the court room for the place of detention, without our sympathies. We believe that, to all intents and purposes, he has got his just deserts. But has he? This question is becoming, year by year, more difficult to answer. There are many things which make it doubtful whether the punishment is just or not. First, there is the court before which he is

tried. Secondly, there is the procedure by which he is tried. Thirdly, there is the sentence meted out to him. Let us look at these things individually.

1. The Court.

There are numerous courts exercising criminal jurisdiction in Canada. These courts are divisible into two classes, superior and inferior. The superior courts of criminal jurisdiction call for little comment. They are, perhaps, the fairest conducted courts in the land, and with the exception of sentences and their variation, which will be dealt with later, nothing further need here be said. Much, however, can be said about the inferior courts. These include the courts of justices of the peace and police magistrates and, with one or two exceptions, these courts leave very much to be desired. Justices and police magistrates (other than stipendiary magistrates) are poorly paid. Their time is usually taken up with other work and they have neither the inclination nor the opportunity to spend their leisure hours in perfecting themselves in their work. The result, however, is unfortunate. It does not fall upon those responsible for such conditions, but it falls upon the unhappy prisoner. Very often it results in a miscarriage of justice. It is true that the prisoner can appeal under Part XV of the Criminal Code if he is tried on summary conviction. But it is not so much in this class that miscarriages of justice prevail. It is in summary trials of indictable offences. In recent years the powers of a magistrate under sections 773 and 777 of the Code have been enormously extended until now the police magistrates in Ontario and the large cities and towns in other parts of Canada have power to try all cases which can be tried at General Sessions. The corresponding rights of appeal have not been extended. The fact is that they have been narrowed down. It must be admitted by all who practise in the criminal courts, that these extensive powers are being exercised by persons who have not the judicial mind. What is the result? Con-

fronted with a large docket of cases ranging from theft to bigamy, not to speak of the unusually voluminous business following a police raid, the magistrate takes the line of least resistance. There is a hurried trial, a quick summing up, and an unconsidered sentence. The prisoner is hurried away to make room for the next and the circumstances of the case forgotten. The prisoner is frequently the victim of such circumstances. It is no fault of his that there is a large docket or that there is no time to deal with his case thoroughly. You say appeal. Appeal! Where is there a right of appeal on these facts in cases tried summarily under section 777 or under section 773, except in one or two isolated cases? The accused is compelled to resort to questions of law or extraordinary remedies. It is true that if the prisoner was fortunate, or unfortunate, enough to have his case tried by two justices sitting together under section 773 he might have a chance of appeal under section 797, but the serious cases are not tried by them.

2. The Procedure.

Criminal procedure is simpler in Canada than in many another country. It is, however, in danger of losing some of its simplicity. Any one who has followed the changes in Part XVI of the Criminal Code with regard to the summary trial of indictable offences, will, no doubt, have recollections of a veritable tangle of legal verbiage in sections 773 to 783. These sections cause more miscarriages of justice than all the rest of the Criminal Code put together. Justices and magistrates have practically given up trying to unravel them. They trust to Providence to guide them right when trying a prisoner. Naturally their tendency is to go wrong.

Again, the procedure for election and re-election is becoming more and more complicated day by day. It very often happens that when a prisoner comes up for trial before the Superior Court he will find a judge sitting on the Bench who has the reputation of hand-

ing out a stiff sentence occasionally. The prisoner immediately takes this matter under advisement with the result that he forthwith elects speedy trial. Then comes a system of jockeying for an easy judge. In this manner a prisoner whose crime perhaps needs a stiff sentence gets off with considerably less punishment than he would otherwise have got. He is wise in his generation. But what about the others? Must they take the stiff sentences without a chance of getting them reduced by another Court. It is obviously unfair to them. They should have an appeal from their sentence.

3. The Sentence.

Sentences vary like the wind. It is becoming a serious problem with defence lawyers to know just what to expect in the way of sentences. Some judges look upon certain crimes as being more serious than others. Very rightly too. So does the Criminal Code. But the trouble is that another judge will not think the same class of crime as being so very serious, knowing, as he does, perhaps, the frailty of human nature. The result is that the sentence meted out in the one case is widely divergent from that meted out in the other. One can readily understand why justices and police magistrates have a different way of looking at crime and criminals, than say, a Superior Court judge. They lack the judicial mind. Then again there are women police magistrates in some of the provinces. Is it unreasonable to suppose that members of the gentler sex who appear before a woman police magistrate will be looked at in a very different way to what they would be looked at in any other court?

Sentences given by justices and magistrates have recently been the subject of comment in the Journal of the American Criminal Law Institute. A series of tables showing the remarkable variations in the length of the sentences in such courts are set out in the article there written. After reading that article it leads one to the conclusion that it is a very doubtful matter

whether half the sentences meted out in our criminal courts really bear any relative proportion to one another considering the class of crime for which they are inflicted.

4. The Conclusion.

There is no question that some remedy is needed for these conditions. It is difficult to know where to look for it, but there is hope in the fact that these difficulties are not confined to Canada. The same conditions existed in England years ago and in fact until comparatively recent times there has practically been no appeal at all in criminal cases. Then one or two grave miscarriages of justices came to light and a Court of Criminal Appeal was established in 1908. This court has extraordinary powers of revising the sentences passed in the lower courts, and particularly reviews those given by the Courts of General Sessions of the Peace. It is in precisely in that same class of case that reform in Canada is needed. This would result in a uniformity of sentences which to-day is sadly lacking. It is hoped that in the near future something tangible will be done. It is needed—and needed badly.

A. E. Popple.

Edmonton, Canada.

OUR BOGUS DOMINION LAND CODE.

By Bram Thompson, M.A. Barrister-At-Law.

The Dominion Land Acts are enactments of the Parliament of Canada respecting "Public Lands of the Dominion."

By the first of these Acts in 1872, these lands are defined as "Lands included in Manitoba and the North West Territories"; and by the last of these Acts in 1908, as (inter alia) "the Lands of the Dominion of Canada in the Provinces of Manitoba, Saskatchewan and Alberta and in the North West Territories."

The legality of these Acts depends partly on the Title of the Dominion to the Lands which for convenience I will call "the Territories"; and partly on the competence of the Parliament of Canada to enact them.

The Dominion has never condescended to reveal a title; it has simply through the Parliament of Canada enacted these Land Acts on an assumption of ownership, reflected in this deft definition that the Territories are "Public Lands of the Dominion." We know of no other Title.

This method of asserting a Title is autocratic. But late though it may be, the future of the West is before it; and both the Dominion's Title and Parliament's capacity are now challenged and in dispute.

In giving reasons against both, I shall not falter in removing the masque and vizor with which the Parliament of Canada has dominated the Territories for well nigh fifty years.

The scheme of Confederation, as embodied in the B.N.A. Act 1867, is a Union of independent entities for Governmental purposes only, and not for achieving a solidified Territorial Unity. To avoid such a Unity, each entity of the Dominion is invested with its own

land and natural resources, together with exclusive legislative authority over them. This leaves the Dominion *ex-necessitate* a landless creation of the Act with the exception of certain public works and property enumerated in a schedule and allotted to the Dominion by Section 108, and what it might acquire under section 117 from the Provinces.

The Dominion has no constitutional capacity to hold, and consequently it cannot acquire a title to, any other land or property.

Have the Territories been so acquired by the Dominion?

The constitutional limitation just stated throws the presumption of the ownership of the Territories completely against the Dominion. An autocratic assumption is not enough; it must prove all it claims; for, if its ownership of the Territories is affirmed, it means that the Constitution set up for us by the B.N.A. Act, in 1867 was demolished at one stroke by a mere definition in a Land Act of the Parliament of Canada in 1872, and that we have been living in a " Fool's Paradise " ever since.

By this transformation, if it is real and not a mere illusion, the Dominion, instead of being a landless entity as the B.N.A. Act designed it to be, owns in defiance of that Act, the equivalent of one half of the territorial area of the confederated Dominion of Canada.

And it is not the Imperial Parliament but the Parliament of Canada that has forged—I use the word in its civil sense—the constitution under which we live.

But I say the proof of this—the competence of the Parliament of Canada to accomplish this—lies on the Dominion.

I do not stop here, however. I proceed to prove the converse of the Dominion claim so far as it is recorded.

The Dominion may, of course, spring on us a Transfer of these Territories or an independent Charter to hold them from the Imperial Government

which so far has never been revealed. But until revealed we are entitled to assume it is *non est;* for the Dominion cannot resort to the legal fiction of a ' lost grant ' in the face of the formidable documentary proofs that I array against its title.

The Dominion, certainly, did not get the Territories when the Confederation was made in 1867. They were admitted to it in 1870 by the Imperial Government under section 146 of the B.N.A. Act, which applies to them equally with British Columbia and Prince Edward Island; and the Order in Council effecting their admission explicitly states that they " shall be admitted into and become part of the Dominion of Canada," upon certain terms set out in an Address of the Parliament of Canada which I discuss later.

Neither the Act, nor Order in Council, nor the terms of admission have the slightest suggestion or indication that the Territories were intended to be admitted or used as " Public Lands," or as " Lands set apart for general public purposes." Even if there had been such an intention on the part of either the Imperial or Canadian Government at the time, the Territories could not have been so admitted to the Dominion without first remoulding and recasting the fabric and framework of the B.N.A. Act, 1867.

But as a fact they were not so admitted; and their admission in the words set out constituted them, just as precisely identical words, afterwards used, constituted British Columbia in 1871 and Prince Edward Island in 1873, separate integers and distinct entities of the Dominion; and as such the B.N.A. Act allocated to them all alike their Land and Natural Resources except what might be appropriated to the Dominion or acquired by it under section 108 or section 117 as already stated.

The whole Territories could not fall within either of these excepting sections; and the only clause of either of them under which any part of the Territories could fall is in item 10 of the Third Schedule to the B.N.A. Act, containing a list of Provincial Property

appropriated to the Dominion by section 108 thus: "Land set apart for general public purposes." This clause, however, is strictly *ejusdem generis* not only with the other clauses or words of item 10, but also with all the other items of this Schedule which applies to such matters as canals, harbours, military roads, customs, post offices, ordnance property, armouries, drill sheds, etcetera. The meaning and extent of this appropriation are obvious. It could not possibly embrace two entities equivalent in area to the half of the Dominion. But quite irrespective of this "Land set apart for general public purposes" under this item 10, or under any part of section 108, requires to be "set apart" in the first instance, by the Province or land-owning Entity, before it could pass to the Dominion. It could not be "set apart" by the Dominion because "setting apart" implies or involves the ownership or dominium. This the Dominion of Canada never possessed.

It is quite certain the Territories, after becoming Entities of the Confederation, never set themselves apart for "general public purposes" under section 108, so as to effect their own transfer to the Dominion and the extinction of the status and rights with which, as such entities, they were invested. Even if they had desired to do this, they could not have effected it, any more than could Ontario or any of the other Provinces, or any more than could the whole Provinces by concerted action, thus transfer their lands "for general public purposes" to the Dominion. Such a proceeding would overturn the whole constitutional fabric, and especially that which is most cherished and most valuable in the Confederation scheme—a landless Dominion constituted of land-owning Entities. And besides this *non possumus* such a Transfer of the Territories would have violated the express purpose, as set out in the Address to the Sovereign, discussed later on, for which they were admitted to the Dominion.

British Columbia did, no doubt, under this Section 108, set apart and appropriate to general public purposes, the Railway Belt. But so fundamental in the constitution is the right of ownership reposed in the Entities that even the enactment of the B.C. Legislature, granting the land to the Dominion, has been construed by the Privy Council to mean no more than an alienation of the revenue derived from a first sale, or realization of it, after which the Proprietary Right and Legislative Authority of the Province reverted to it in full force.

If, then, the Territories did not, and could not, set themselves apart and transfer their land to the Dominion for " general public purposes " under Section 108 of the B.N.A. Act, had the Parliament of Canada authority to perform the bountiful, but most unconstitutional, trick for them?

Assuredly not. But, unlike the Dominion Parliament, I am not an Oracle and must avouch my utterance with reasons.

Now at this juncture it is necessary to explain that the Parliament of Canada had two capacities in relation to the Territories, adherent to which were two sets of Powers.

The first which I will call its " Constitutional Capacity" was what is conferred by Section 91 of the B.N.A. Act, 1867, over every Entity alike of all the Dominion of Canada. It does not extend to their land and natural resources; and under it the Parliament of Canada had no authority whatever to touch the Territories and it could not have appropriated them under Section 108 of the B.N.A. Act.

The second capacity which I will call its " Territorial Trust Capacity " became necessary when the Parliament of Canada prevailed upon the Imperial Government to admit the Territories to the Dominion as already described. The Imperial Government, though favourable to their ultimate admission, had been reluctant to prematurely place them in a position of responsible self-government before they had been

fully fitted, just as had been the Colonies east and west of them, for the exercise of the rights which, as Entities of the Dominion, would instantly accrue to them. They were then wholy unequipped. Canada, however, was urgent and even impetuous; for she foresaw and apprehended disaster to her cherished scheme of an Ocean to Ocean Dominion, in the possible rise of a rival Western Dominion consisting of the Territories and British Columbia. She insisted, almost as a matter of life and death, that the Territories must then enter the Dominion; and to meet and remove all scruple or difficulty on the part of the Imperial Government, owing to the fact that the Territories had no local legislature nor anything in the nature of it, the Parliament of Canada proposed to relieve the Imperial Government of what it deemed its duty to the Territories, and to undertake and carry out in them all the reforms and improvements which were desirable and necessary for fully fitting them to assume their own autonomous rights as Entities of the Dominion.

This was the basis of a Governmental Compact.

As a *sine qua non* to its acquiescence, the Imperial Government required Canada to embody in an Address to the Sovereign, asking for the admission of the Territories to the Dominion:

(*a*) The purposes for which it designed the Territories.

(*b*) The developments and improvements proposed for them.

(*c*) The undertaking of the Parliament of Canada to assume the Governmental obligations of these matters.

The Address accordingly sets out:

(*a*) That it would promote the prosperity of the Canadian people and conduce to the advantage of the whole Empire, if the Dominion of Canada constituted under the provisions of the B.N.A. Act, 1867, were extended westward to the shores of the Pacific Ocean.

(*b*) That the colonization of the fertile lands . . . the development of the mineral wealth . . . . and the extension of commercial intercourse . . . from the Atlantic to the Pacific, are alike dependent on the establishment of a staple government for the maintenance of law and order in the North West Territories.

(*c*) That the welfare of the population . . . would be materially enhanced by the formation therein of political institutions bearing analogy . . . to those which exist in the several provinces of this Dominion.

Next it recites Section 146 of the B.N.A. Act, 1867.

Then it asks the Imperial Government:

(*a*) To unite Rupert's Land and the North West Territory with this Dominion.

(*b*) To grant to the Parliament of Canada authority to legislate for their future welfare and good government.

And it concludes:

"We most humbly express to your Majesty that we are willing to assume the duties and obligations of government and legislation as regards these Territories."

Upon these terms and conditions the Territories were admitted into and made part of the Dominion subject to the B.N.A. Act 1867.

And the powers conferred upon the Parliament of Canada for carrying out these purposes are:—

1st, By Rupert's Land Act, 1868, thus:—

"It shall be lawful for the Parliament of Canada to make, ordain and establish within the land and territory so admitted . . all such laws, institutions and ordinances and to constitute such Courts and officers as may be necessary for the peace, order and good government of Her Majesty's subjects and others therein."

2nd, By Order in Council of 23rd of June, 1870, thus:—

"That the Parliament of Canada shall have full power and authority to legislate for the future welfare and good government of the said Territory."

Now, then, as the result of this Governmental Compact the Parliament of Canada acquired its "Territorial Trust Capacity" with the powers just mentioned, as pertinent to it. In this capacity the Parliament of Canada was not only in a Trust relationship to the Imperial Government, but it stood *In Loco Parentis* to the Territories themselves pending their adolescence as self-governing entities of the Dominion.

It is obvious that what was to be done for the Territories by the Parliament of Canada, in this capacity, strictly pertained to, and normally was within the sphere of, a Local or Colonial Government; and the undertaking in the Address "to assume the duties and obligations of Government and legislation as regards these Territories" was nothing more, and nothing other, than an undertaking to supply the place of a Legislature for the Territories for carrying out in them the reforms and improvements specified in the Address.

And when accepted and the Territories admitted, this undertaking became a Trust obligation on the Parliament of Canada while the powers conferred by Rupert's Land Act and the Order in Council were merely correlative powers to implement the obligation. Though they were delegated to the Parliament of Canada at its own request, they were very restricted; for their general words were particularized by the purposes for the accomplishment of which they were given.

They could not be expanded beyond that. The appropriation of the Territories themselves was not one of the purposes, nor was it necessary to their achievement. It was, in fact, in direct antagonism to them; for we must remember that everything proposed to be done, and everything covered by the obligation, was subsidiary to the cardinal project set out in the Address of "extending westward to the Pacific Ocean, the Dominion of Canada as constituted under the B.N.A. Act, 1867." That was the *ne plus ultra*—the insuperable limitation.

The Parliament of Canada could not in this Territorial Trust Capacity and in virtue of its adherent powers, appropriate under the B.N.A. Act, 1867, the Territories as "Lands set apart for general public purposes" or as "Public Lands of the Dominion," even if it was untrammelled by the appendant Trust.

The powers in Rupert's Land Act were for definite structural works, governmental and material, and the power in the Order in Council was to legislate "for the future welfare and good government of the Territories," but strictly, nevertheless, in reference to those authorized works and the purposes set out in the Address. These powers neither divested the Territories of, nor invested the Dominion with, any proprietary right. And they did not impart to the Parliament of Canada any authority or power to alienate or transfer the Territories to the Dominion whether such a transfer were, or were not, for their " welfare and good government."

A Trustee with the most unlimited discretion of management or even of Sale cannot buy up the Trust Estate on any pretext. If the Trust is onerous, he can renounce it; but he cannot, on the plea that he has expended some money, or even that it is for the " welfare" of the *cestui que trust,* assume the absolute ownership of the Trust property. Nor could the Parliament of Canada utilize its fiduciary powers to acquire the territories for the Dominion, of which it is merely the legislative organ; or in other words, to enrich itself by annihilating the Beneficiary; for the complete appropriation of the Territories by or to the Dominion was nothing short of their complete annihilation as Entities.

Nor is this all. These powers were given for a distinctly opposite purpose; namely to preserve the Territories as Entities and to constitutionally develop them so that the Dominion " as constituted " under the B.N.A. Act, might be extended westward to the Pacific; and not that the Territories should be effaced, and the Dominion itself installed as the holder and

owner of one half the whole Territorial area of the Confederated Dominion as Public Land—*a Res Commune;* and a thing obnoxious to the whole scheme of Confederation.

This would violate everything fundamental in the Constitution; and more than that, if it were effectually done, it would destroy an Entity of the Dominion that the Imperial Parliament had created and established ! Without the ownership of their land, the Territories are merely the name of a geographical area of Canada subordinate to the Dominion.

But even if the Parliament of Canada had the power to do these things, it has never yet had the courage—or effrontery—to do them. The wish has no doubt been father to a wriggle, but it has failed to produce a direct enactment. Parliament has not in its Territorial Trust Capacity used, or tried to use, its legislative power avowedly to transfer the Territories to the Dominion as "Public Lands," or as "Lands set apart for general public purposes." But it has pretended to accomplish the feat by the magic of a circumlocutory definition in the Dominion Land Acts. These Acts, however, do not deal with the Territories, but with "Public Land of the Dominion" the ownership of which must have become, previously, vested in the Dominion.

How was it done?

It could not be done by Parliament in its Constitutional Capacity.

It could not be done in its Territorial Trust Capacity.

And could it be done by using conjointly the two Capacities? Assuredly not.

The two Capacities are in no way complementary of each other. The one is Dominion wide; and the other is Territorial. They are entirely independent; and though they are when rightly used not antagonistic, they immediately come into conflict; if anything is attempted to be done in contravention of the B.N.A. Act. They cannot be fused together any more than the

functions of Parliament and the functions of the Provincial Legislatures under the B.N.A. Act; and the fact that they are both *pro tempore,* vested in one Body—the Parliament of Canada—makes it all the more impossible to fuse them together so as to produce a colossal agglomerated power designed to render the Parliament of Canada omnipotent.

The two sets of Powers were given deliberately in two Capacities so that one might be a restraint on the other. If the Territories when admitted to the Confederation had been given or were intended to be given, to the Dominion as "Public Land" or "Land set apart for general public purposes" any powers that Parliament required to deal with them, would have been added to its constitutional legislative authority under Section 91 of the B.N.A. Act, 1867.

The coalescing of the powers would be tantamount to the creating for the Parliament of Canada of a new Function and a new Capacity. This, of course, could not be done. But even if the two were fused and coalesced, the hotchpotch power, thus evolved, could not authorize the Parliament of Canada to imperiously override the B.N.A. Act, 1867, by elevating the Dominion from a Landless Entity entrusted only with Governmental Functions, as that Act designed that it should be, into the place of a Territorial Sovereign over one half the Confederated area of Canada. This, however, the Dominion has aimed at; and this indeed it has to its own satisfaction at least attained, by ways and means unconstitutional, obnoxious, and vile, so far as the Territories are concerned.

Its death knell as a self-constituted Autocrat is now sounded.

Now I turn to the first Dominion Land Act, 1872, which is the prototype and progenitor of all the rest.

First I ask in which Capacity the Parliament of Canada passed this Act?

It is essential to know; for Acts passed in its Constitutional Capacity are Dominion Enactments; and

Acts passed in its Territorial Trust Capacity are Territorial Enactments.

Is this Act then a Dominion or a Territorial Enactment?

The Act truly is a mystery. It looks like, and reads like, a Dominion Enactment. But it shrinks from the touch as if it sought to conceal what a Statutory Enactment is designed to proclaim.

It begins with an assumption of ownership by the Dominion of the Territories, first by its title, "An Act respecting Public Lands of the Dominion," and next by its definition that the Territories are "Public Lands of the Dominion."

In its Territorial Trust Capacity, Parliament could not pass this Act.

I have already shown that the Territories were not admitted to the Dominion as Public Land. How then did they become so between their admission in 1870 and this Enactment in 1872?

The Act does not reveal this radical fact; and it has never since been revealed, nor has the Government or Parliament of Canada ever condescended to expound or explain the magical metamorphosis.

It cannot surely be pretended that the assumption of ownership as embodied in the title and definition is itself a Title or a Transfer of the Land. Yet this assuredly is all we have or know of the transformation. There is, of course, no direct avowal or enactment of Ownership by the Act; and it does seem as if this assumption were put forth in the sly, dubious way in which it appears in the title and definition of the Land Acts, so that if assailed a *bonhommie* explanation of the "true intent and meaning" of the Act would follow at the next Session of the House. If not assailed —and who in 1872 was there to assail it?—time, it was conjectured, would perfect the imposture by the influx of new fangled and gullible inhabitants surging in from all-the-world-over who would accept it as a truism that the Territories were Dominion Lands. Thus it

was designed that the assumption would first crystallize into a blind belief, and ultimately prevail as an orthodox Constitutional fact.

And thus indeed it has evolved, though the assumption in every fibre of it is false; and its roots and branches tangle and encumber our legal system and retard our development.

It is not an appropriation of the Territories to the Dominion under Section 108 of the N.B.A. Act, 1867.

It is not a Transfer of them; and it is not a Title to them.

It is an arrant usurpation; and the Title of an Usurper is the only Title of the Dominion of Canada to Rupert's Land and the North West Territories to-day. It has never had any other Title.

The conclusion, then, is inevitable that the Dominion Land Acts if enacted by Parliament:

(*a*) In its Constitutional Capacity are *Nullitas Nullitatum.*

(*b*) In its Territorial Trust Capacity are *Ultra Vires.*

Because:

(1) The Dominion never had any proprietary right in or title to the Territories as Public Land; and

(2) The Parliament of Canada had no pretence of right or authority to enact these Acts for the Territories as Dominion Land either under:

(*a*) The B.N.A. Act, 1867.
(*b*) Rupert's Land Act, 1868.
(*c*) Order in Council of 1870; or
(*d*) A hotchpotch of them all together.

So far I have discussed the Territories. But what I have said concerning the Dominion Land Acts as affecting them, is also applicable to the Provinces carved out of them, but with a thousand-fold accentuated and intensified force.

The Parliament of Canada was invested by the B.N.A. Act, 1871, with the power "to establish new

Provinces forming for the time being part of the Dominion of Canada, but not for the time being included in any Provinces thereof."

This power was an addition to its "Constitutional Capacity," and it was conferred not only in furtherance of the cardinal project for achieving which the Territories entered the Dominion,—the project of extending Westward to the Pacific, the Dominion "as constituted" under the B.N.A. Act,—but it was also the designed means by which the Parliament of Canada should, when it saw fit, terminate its territorial Trust Obligations.

After establishing a Province the Parliament of Canada had no further obligation under its undertaking, and no authority over the area included within the Provincial boundary, except what it had in its constitutional capacity under Section 91 of the B.N.A. Act, 1867. The establishment of the Province was the most perfunctory of all acts which the Parliament of Canada was empowered to do. It involved no more than demarcating an area and naming it a Province. The utterance of the name brought the B.N.A. Act into full operation; and the land and natural resources of the Provincial area became the property of the new Province with the power (*inter alia*) conferred upon the Provincial Legislature by Section 92 to "exclusively make Laws in relation to the management and sale of the Public Lands belonging to the Province."

The Parliament of Canada could not when establishing a Province either withhold the land or impair this power. All attempts to do so are simply unconstitutional and void; and all Dominion Land Acts, including the last one in 1908, passed subsequent to the establishment of any Province, dealing with the Provincial area as Dominion Land, are illegal, void, and crassly unconstitutional. All Government acts of the Dominion, including the granting of titles, are in the same category as the legislative Acts of Parliament.

Manitoba was formed in 1870, Saskatchewan and Alberta in 1905; and the Parliament of Canada in the

Acts constituting or establishing them has with euphonious irony dubbed them "Provinces of Canada." But so far from being that, they are, as they appear on the Statute Books, merely geographical areas of Land subordinate to the Dominion; for they are despoiled of their land, and their Legislatures are depleted of one of the most valued powers conferred upon them by the B.N.A. Act, 1867, both of which have been arrantly and autocratically arrogated to their August and Magnanimous Suzerain—the Dominion of Canada!

Long indeed have they been beguiled; but if they never knew the irrefutable truth before, they know it now; and unless they are cravens, longer they cannot be content to merely formulate platitudes on the "Equality of Provincial Rights," and eat the servile dust of degradation doled out to them by the Dominion, and the Parliament of Canada.

Delenda est Carthago.

Regina, August, 1919. BRAM THOMPSON.

BY THE WAY.

THE EMERGENCY LEGISLATION OF THE WAR.

Our London Letter shows that the mother country is equally with ourselves in a quandary as to how to deal with the enormous quantity of drum-head law that is evoked by the vicissitudes of a great war. It is easy for the arm-chair student of the Constitution to say "Repeal the whole bundle of Acts, Regulations and Orders-in-Council and put the law back on its old constitutional basis as before the war."

But one of the redeeming things about a great war is that its terrific strain puts a vital test on every bolt and rivet in our political, financial, commercial and social machinery. Some of the Order-in-Council legislation may have been the result of panicky nerves. But in most cases these emergency regulations represented a weakness or a danger in our system, any of which may have been adequately or only clumsily met by the war-time regulation.

It would, therefore, be sheer improvidence to waste-basket all this body of experience, which should be most carefully analysed and whatever is vital and necessary should be made permanent repairs and betterments to our body of laws respecting Commerce and Citizenship. Too much water has gone under the bridge for things ever to be allowed to be as they were before the war.

WHEN OUR YOUNG PEOPLE JOY RIDE.

The tendency of the mere owner of the motor car, when son or daughter—the beneficiary—takes it out, is to onerate him or her with some message or duty; to call somewhere or bring something. The danger of such a procedure is set forth in the following case

which we clip from *The Queensland Justice of the Peace:*

Negligence—Principal and Agent—Motor Car driven by Daughter.

"In an action brought by the Mayor of Timaru against a farmer named George Squire (1919, G.L.R. 75), for damage done to a motor-omnibus, of which the Town Council of Timaru were the owners, Sim, J., made the following remarks on hearing an appeal against the decision of the Magistrate who tried the case in the lower court:—

"George Squire, the respondent, was the owner of a motor-car. His daughter Annie Squire, while driving the car one day in Timaru, brought it into collision with a motor-omnibus belonging to the appellant. The appellant sued both the respondent and his daughter and claimed damages for the injuries thus caused to the omnibus. The magistrate (Mr. Day) found that the collision had been caused by Annie Squire's negligent driving, and gave judgment against her for £85 3s. 7d. and costs. He held that the respondent was not responsible for his daughter's negligence, and gave judgment in his favour. The appellant has brought an appeal on fact and law from this decision so far as it relates to the respondent.

"The question to be determined is whether or not it has been made out that Miss Squire, at the time when the collision took place, was acting as her father's agent in driving the car. In order to make him responsible for his daughter's negligence it is not necessary to prove any contract of hiring and service between them, the terms 'servant' and 'agent' being used in the authorities as pretty well synonymous. *Flannagan* v. *Fellick*.[1] Now, it was proved that the respondent was the owner of the car in question, and that of itself appears to be sufficient *prima facie* evidence that the negligence which caused the collision was imputable to the respondent, without proving affirmatively that the

[1] 2 N. Z. L. R., S. C. 85, 87.

person in charge was the respondent's servant. That is how the law is stated in Shearman and Redfield on the Law of Negligence (5th Ed., par 159), and the learned authors say that in such a case it lies with the owner to show that the person in charge was not his servant, leaving him to show, if he can, that the property was not under his control at the time, and that the accident was occasioned by the fault of a stranger, or independent contractor, or other person for whose negligence the owner would not be responsible. This view of the law was accepted and acted on by Mr. Justice Williams in the case of *Flannagan* v. *Fellick.* There one of the plaintiffs had been injured by a horse belonging to the defendant, which was being ridden by a boy to whom it had been delivered by the defendant. It was held that proof of the ownership of the horse was sufficient to throw on the defendant the burden of proving that the boy was not his servant or agent. This view as to the onus of proof in such a case is supported by the decision in *Joyce* v. *Capel,*[2] which was a case of a barge, and also by the decision in *Hibbs* v. *Ross,*[3] which was a case of a ship. In *Aldridge* v *Paterson,*[4] Mr. Justice Cooper thought the same rule should be applied to the case of a taxi-cab, and Lord Esher's judgment in *Smith* v. *Bailey*[5] appears to support this view as to the onus of proof. See Beven on Negligence (3rd Ed., p. 589, note 2).

"I think, therefore, that the rule in question ought to be applied in the present case, and that, as the respondent was the owner of the car, he is *prima facie* responsible for his daughter's negligence. The question, then, to be considered is whether or not the respondent has made out clearly that his daughter was not acting as his agent when the collision took place.

"If the evidence had made it clear that Miss Squire was engaged on what Baron Parke in *Joel* v. *Morri-*

[2] 8 C. & P. 370.
[3] L. R. 1 Q. B. 534.
[4] 16 G. L. R. 593, 595.
[5] 1891, 2 Q. B. 403, 406.

son,[6] called a frolic of her own, then the presumption of agency would be rebutted. If, for example, it had been proved that Miss Squire had used the car merely to visit one of her own friends in Timaru then the business would be her own and not her father's. Nor would it be his business if, with his permission, she had used the car to take Miss Moore on a visit to some neighbour's place, because, as is pointed out in Salmond on Torts (4th Ed., p. 104), a master is responsible for what he employs his servants to do for himself. A master may be responsible, however, for the negligence of his servant, although the principal business of the expedition is the servant's own. That is clear from the case of *Patten* v. *Rea.*[7] In the present case the business on which Miss Squire was engaged certainly concerned the respondent, for she was creating the relation of host and guest between him and Miss Moore—a relation which would impose on him certain legal responsibilities. In the absence of any evidence to the contrary, that ought to be treated as the respondent's business, and the presumption of agency, therefore, has not been rebutted."

LIBERTY OF TESTATION.

A quite readable article on "*Liberty of Testation and Some Modern Limitations thereon,*" by Prof. Orrin K. McMurray, published in the Illinois Law Review, collects the various theories as to the desirability and nature of the testamentary power.

Of the theory brought forth by the French revolution, Prof. McMurray says:—

"With the French revolution, these theories are greatly altered. 'What is a testament?' exclaims Mirabeau. 'It is the expression of the will of a man who has no longer any will, respecting property which is no longer his property; it is the action of a man no longer accountable for his actions to mankind; it is an absurdity, and an absurdity ought not to have the force of law.' It would be difficult to find in the annals of legal debate a more dramatic

[6] 6 C. & P. at p. 503.
[7] 2 C. B. (N.S.) 606.

scene than the reading by Talleyrand of this eloquent address before the National Assembly on the 2nd of April, 1791. The author, himself the disinherited victim of an arbitrary father, lay still in death while his voice as from the grave inveighed against the power of testamentary disposition as contrary to the dictates of humanity. And there can scarcely be found a better example of the folly of a purely rationalistic treatment of a great and ancient legal institution than is afforded by the fact that Mirabeau made a death-bed will on the very morning of the day that Talleyrand read his 'testament politique.' The same inconsistency has been charged to Plato, who like Mirabeau criticized the will, and like him died testate."

Whatever treatment other races may adopt of this privilege of testation, the practice of making a will is too deeply rooted in the habits of the Anglo-Saxon ever to be abolished.

Who, for instance, could be cruel enough to prevent a dear old lady from apportioning by will and re-apportioning by codicil her diamond ring and her emerald ring and her amethyst brooch and her furs and wearing apparel?

Moreover, making all necessary allowance for the crotchets and whimsies of old age, the testamentary power is a disciplinary weapon in the hands of the family head, and a powerful insurance against premature ingratitude. One of the most painful discoveries in human character is what all lawyers sooner or later are forced to admit, viz., that, in many families, natural love and affection, like silver coinage, is legal tender for an amount not exceeding ten dollars.

OUR LONDON LETTER.

44 BEDFORD ROW, LONDON, W.C. 1.
AUGUST 9TH, 1919.

The Editor,
"The Canadian Law Times,"
Toronto, Canada.

SIR,—The legal year has now ended, the Courts rising for the Long Vacation on the 31st July. In the Court of Appeal and in the Chancery Division work is well up to date, but the King's Bench and the Probate and Divorce lists are in serious arrears.

One of the chief tasks before the Prime Minister is to put the Cabinet on a peace basis. The small War Cabinet, consisting of Ministers without departmental duties and sitting every day, was avowedly a temporary expedient to meet a great emergency. Its chief asset was rapidity of decision, so essential in war. But it had obvious disadvantages, and it virtually abrogated the principle of the collective responsibility of Ministers for the acts of the Government.

It is understood that the place of the War Cabinet is to be taken by a Cabinet of about a dozen members, including the Ministers at the head of the chief Departments of State, and that a great part of the machinery of the War Cabinet, including the Secretariat, is to be retained. The question of numbers is vital. If all the Ministers in charge of Departments were brought in, the Cabinet would consist of some 30 members. Even Mr. Asquith, with the largest Cabinet on record in the first Coalition, never had more than 22 colleagues. Under the old dispensation there were certain Ministers who were invariably included in the Cabinet. They were the First Lord of the Treasury, the Chancellor of the Exchequer, the Secretaries of State, the First Lord of the Admiralty, and the Lord Chancellor. Mr. Lloyd George is hardly likely to leave out of his Cabinet the holders of any of these offices.

The remaining places will be filled from the ranks of the heads of first-class Departments. It is hardly likely that the much-criticised experiment of bringing the Attorney-General into the Cabinet will be revived. A large Cabinet almost invariably leads to the formation of an inner Cabinet of three or four Ministers, who become the real originators of policy.

The Ministers and Secretaries Bill, the main purpose of which is to increase from £2,000 to £5,000 a year the salaries of the President of the Board of Agriculture and Fisheries, the President of the Board of Education, the Minister of Labour and the Minister of Food, has met with considerable opposition in the House of Commons, where the second reading was only carried after it had been announced that the remaining stages would not be taken until the autumn. The Bill also proposes to raise the Secretary of Scotland, who has a salary of £2,000 a year, to the status of a Secretary of State which carries a salary of £5,000 a year. The Pensions Minister and the Postmaster-General are to continue to remain lower down in the hierarchy.

The Government have introduced into the House of Commons a Bill, the object of which is to check profiteering, and it is hoped to carry this through before the recess. It is proposed to confer on the Board of Trade power to investigate prices, costs, and profit in respect of all articles in common use by the majority of the population, excluding controlled articles. In cases in which, after investigation, profiteering is proved, the person responsible shall be liable on summary conviction to a fine not exceeding £200 or to imprisonment not exceeding six months. Local authorities may be empowered by the Board of Trade to purchase and sell any article or articles to which the Act applies and use all necessary powers for that purpose.

Widespread dissatisfaction is felt among the profession and in the House of Commons at the attempt of the Government to extend the operation of a number of Emergency Acts and Regulations for a year

after the present war. The War Emergency Laws (Continuance) Bill does not define the "termination of the war," but it is understood that the term means the last ratification of the Peace Treaties with the remaining enemy belligerent powers, viz., Austria, Bulgaria and Turkey. The legislation dealt with in the proposed Bill includes not only 87 of the Defence of the Realm Regulations, but also the Aliens Restriction Act, 1914, the Trading with the Enemy Acts, 1911 and 1916, the Special Constables Act, 1914, etc. With the Defence of the Realm Regulations the power of summary trial and the infliction of imprisonment up to 2 years with hard labour is proposed to be kept in existence. The "Peace Dora," of course, contains many provisions with which the public will agree. Among these are the prolongation of the powers of the Food, Shipping, and Coal Controllers. Far otherwise, however, is it with other clauses of the Bill, and the measure has evoked so much opposition that the discussion of it in the House of Commons has been postponed for the present. Incidentally the Bill affords an excellent example of the inconveniences attendant upon legislation by reference, inasmuch as it contains some 19 acts and 97 regulations, and also presumably the vast number of orders made thereunder.

It is one of the anomalies of our law that the Crown is not liable to pay costs to a subject. The general rule is, however, subject to certain exceptions. It applies only to the Crown or the great Departments of State when carrying on the general business of the Crown; and it does not apply to persons in the service of the Crown against whom a special order to perform a public duty has been made by mandamus or otherwise. The question came before a Divisional Court of the King's Bench Division recently in the case of *R.* v. *Special Commissioners of Income Tax, Ex parte Dr. Barnardo's Homes.* In that case the Court had made absolute a rule nisi for a mandamus to the Special Commissioners of Income Tax to allow a certain exemption from tax to Dr. Barnardo's Homes, the residuary

legatees under a will. It was argued for the Commissioners that they were to be regarded as the Crown, and therefore that in the absence of statutory provisions to the contrary, the Common Law rule that the King and those who act directly for him neither pay nor receive costs protected them. It was, however, held that the limitation of the rule as to costs did not apply, as the mandamus had not been directed to the Crown, but to an official of the Crown bound to perform a statutory duty. The point before the Court, said the Lord Chief Justice, had never hitherto been really argued, but now it had been argued most carefully. It was important that the public should know that when they thought they had a right to be exempted from the payment of Income Tax and were refused exemption, they could come to that Court and take action and receive costs from the Commissioners. The Court ordered the costs to be paid by the Commissioners.

In a recent debate in the House of Commons the establishment of a system of devolution in legislation was urged as essential, having regard to the increased interest in matters of foreign policy which has been the inevitable result of the Great War. It was urged that the average man would in the future take a vastly greater interest in foreign policy, and, in so far as the War was the result of bad diplomacy, would see that our diplomacy was good. In the opinion of those who favour the new devolution scheme, the British Parliament should be just as much in a position of freedom from the local concerns of England, Scotland, Ireland, and Wales as the Dominion Parliaments of Canada and Australia are with regard to the local concerns of Manitoba or New South Wales. A Committee has been formed with the Speaker as Chairman to enquire to what extent such a scheme is practicable. If certain kinds of business were delegated to subordinate assemblies in different parts of the country, the Imperial Parliament would be set free for greater and higher duties, and would have more time to concen-

trate on these international questions which become more important as the years run on.

The Annual Report of the Public Trustee declares that the steady expansion of business indicates that the public demand for the services of the Public Trustee continues unabated. The growth of this office has been truly phenomenal. Since its inception in the autumn of 1907 it has risen from nothing to the administration of nearly 13,000 trusts with an aggregate value exceeding a hundred millions sterling. It is estimated that the value of the business negotiated since the office was opened in January, 1908, exceeds 244 millions. With such a vast business it is remarkable that the office, instead of being a profitable one, has for the past three years shown a large and increasing deficit, that for the year ended 31st March last amounting to £52,990 as compared with a deficit of £3,092 in 1916-17.

The King has conferred the Order of Merit upon Mr. Lloyd George to mark His Majesty's high appreciation of the pre-eminent services rendered by the Prime Minister both in carrying the war to a victorious end, and in securing an honourable peace.

Yours, etc.,

W. E. WILKINSON.

NEW BOOKS.

Comparative Administrative Law, with Special Reference to the Organization and Legal Position of the Administrative authorities in British India, by Nagendranath Ghose, M.A.B.L., Vakel, High Court, Calcutta: London, Butterworth & Company; Toronto, The Carswell Co., Ltd.

Most of us are well-informed as to the methods of governing India, having read Kipling and his imitators. There are, however, some few things which Rudyard dealt vaguely with, including the administrative machinery by which a couple of hundred million British subjects are governed. These little matters we shall find in Prof. Ghose's lectures. We shall find not only the history of India Administration but a minute working out of it: take for instance Lecture XI, "Organisation of Departments," and Lecture XII., "Organisation of Offices and Services."

But the best of this book—the part that determines us not to read it but to use it as a bank—is that it is "Comparative." This is a modest statement. The fact is that you can find here in concise form the treatment by any and every race that has left a history of almost every conceivable problem in administrative government. If you are interested in the "elimination of patronage" read pp. 300 *et seq.* If you want to know about ward organisations in medieval cities see p. 55.

One of the most interesting of his comparative studies is on "Bureaucracy" and it appears that there was once a "benevolent bureaucracy." At least Alexander found one as a going concern in India about 326 B.C.; and presumably wound it up.

We recommend this book, especially to two sorts of people, to editors, that they may acquire erudition over night on any current topic of administration and to zealous reformers that they may see what happened when other fellows tried the same totally new experiment.

The Law relating to the Reconstruction and Amalgamation of Joint Stock Companies, together with Forms and Precedents, by Paul Frederick Simonson, M.A., Barrister-at-Law: London, Sweet & Maxwell, Ltd.; Toronto, The Carswell Co., Ltd.

The third edition of this useful publication has been elicited by the numerous amalgamations of banks and insurance companies during the latter part of the war. While much of the text is based on specific clauses in the old country Companies Consolidation Act, 1908, nevertheless it is worth consulting by anyone contemplating (or resisting) an amalgamation.

THE FOOL'S PARADISE.

MARVIN LESLIE HAYWARD.

The rheumatic stairs creaked protestingly as the young man climbed to the third floor of the rickety building on the corner of MacDonald Street and Tupper Avenue; and the cobwebs had apparently been undisturbed since the days of William Lyon.

"Surely, Brewster can't be the business man father always thought, judging from appearances," mused Hartt as he walked to the rear of the long hall and knocked at the door of a small room, a little pucker of perplexity bisecting his boyish brow.

The door opened cautiously, and a tall spare man with a weazened face and overhanging white brows, stood on the threshold and peered through a pair of old-fashioned spectacles. His shoulders were bent, as if from much stooping over books of account, and his black frock coat would not have been accepted as collateral for a fifty cent loan.

"I am Donald Hartt," said the caller, producing his card. "I have often heard father speak of you, and thought I would look you up."

"Your father and I were great friends," smirked John Brewster as he led Donald to a seat, "and it's very thoughtful of you to look up an old recluse like myself."

"Not at all," declared Hartt genially as he took a seat, "and as you were one of father's friends and about the only one of the older men in the city who knew him, it's a genuine pleasure to meet you."

"But you don't resemble him at all. I'd never have taken you for Fred Hartt's son," said Brewster, peering keenly at his visitor.

"No," replied Hartt, "I resemble mother's people more, they tell me."

Brewster made no comment on this piece of family information.

"Were you sizing up my little library?" he queried, as Donald's glance wandered to a well filled bookcase which was the only respectable looking piece of furniture in the shabby room.

"You certainly have a fine library, and they're all law books, too," exclaimed Donald, a little surprised at the sudden change in the conversation. "I didn't know you were a lawyer," he added, with a hasty appraising glance at the old man's unprofessional appearance.

"I'm not," replied Brewster; "but I've read a great deal along legal lines, and so am able to do all my own law business. Haven't paid out a cent for advice in the last twenty years, and I've certainly saved some money. The way these law sharks in Toronto charge is something scandalous, and the Government ought to take hold of it," he concluded, with a painful reminiscent grimace.

"I don't know much about it myself," admitted Donald; "but I've always had the idea that it paid a man to get the best medical or legal advice he could, and not take chances. I remember reading a novel once where one of the characters contended that 'an amateur at law is as dangerous to himself as a self-cocking revolver in the hands of children, or a red-eyed bulldog among sheep,' and it struck me as being sound doctrine."

"Nonsense," scoffed Brewster, "that may be all right for a novel; but I've been 'an amateur at law,' as you call it, for quite a few years, and I've always 'got by,' as the young people say."

"You may be right," Donald hastened to assure him; "but I always had the idea that it was the work of a life time to really master the principles of law, or of any other profession for that matter."

"I've mastered enough law to do me all right," maintained Brewster.

"It's certainly a great advantage," agreed Hartt.

"But you didn't come to talk about such matters," said Brewster; "tell me something of yourself. How long has your father been dead?"

"About fifteen years."

"Did he leave you fairly well provided for?" queried Brewster, benevolently.

"No," replied Donald. "A few years before his death he lost $100,000 in 'White Cloud' mining stock, and it left practically nothing after the debts of the estate were paid."

"I thought that mine made a big strike and the stock went up like a rocket?"

"That's where father lost," exclaimed Donald. "He bought the stock at a pretty high figure and it 'slumped' the next week. Then one summer he was up in Northern Ontario and got a wire from a Toronto broker offering him what seemed like a good figure for the stock compared with the low price, so he decided to pocket his loss and accepted the offer. When he got back to civilization and got hold of a market report he found that the stock had gone out of sight the day before he sold, and that he had practically thrown it away."

"Too bad," commented Brewster, a sympathetic thrill in his cracked voice; "but your father's brother, William, I think, was fairly well fixed?"

"He was," answered Donald; "I was his favorite nephew, and he willed me $35,000."

"That's enough to give you quite a start," averred Brewster, paternally. "What have you decided to invest it in?"

"I'm rather undecided," admitted Donald. "I've thought some of going west, and have a little idea of investing in real estate here in Toronto."

"Toronto real estate's the very best investment I know of for a young man," declared Brewster with a sudden show of interest; "for the city is sure to grow wonderfully in the next thirty years. Now this building of mine right here is a snap for a young man. The rent brings in a good return on the money and it's sure

to appreciate in value. I wouldn't sell if I were not getting old and didn't want to have the bother of looking after it."

He did not state what he knew full well from his own experience—that the business glory of MacDonald Street and the residential grandeur of Tupper Avenue had departed, and that the building had been a pale and unwieldy elephant on his avaricious hands for years.

"I haven't thought much about any particular investment," hesitated Hartt.

"I'll sell you the building as it stands for twenty thousand dollars, including the current month's rent," offered Brewster.

"Well, I'll think it over," said Donald.

"Do," urged Brewster, a cunning gleam in his crafty eyes. "There's nobody I'd rather see have it than the son of my old friend."

"I'll let you know day after to-morrow," said Donald.

"You'll never regret it, my boy," declared Brewster.

Donald's knowledge of the city was limited; he had no friends whose advice he could ask, and two days later he paid over the cash and took a deed of the building.

"I'm glad to see you've given up the idea of going west and intend to stay with us," said Brewster, piously.

"Oh, I haven't given up the idea at all," replied Donald. "In fact I'm liable to leave any day this week."

"What will you do with the building?" queried Brewster, thanking his lucky stars that the cash was safe in his possession.

"I'll keep it for a sort of solid investment to fall back on if times go too bad in the west," was the boyish reply, "and I'll leave it in the hands of an agent till I get back."

"Oh, that reminds me," exclaimed Brewster; "I'm living now you know, in a little room on the third floor of the building where you visited me the other day, and I'd like permission to stay on for a few weeks till I get another place."

"Sure. Stay as long as you like."

"And there will be no rent?" quavered Brewster.

"Rent from father's old friend. Certainly not. What do you take me for?" was the indignant reply.

"It is certainly kind of you, and I'll not forget it."

"Don't mention it," was the careless response as Donald pocketed his deed.

Back in the shabby little room again Brewster rubbed his wrinkled hands in high glee.

"I'd rather sting Hartt than anyone I know of," he told himself, "and if he isn't bit on this deal, I know absolutely nothing of real estate conditions in Toronto.

"And I'm justified in hating him," he continued, as if arguing with himself, "for he's Fred Hartt's son, and he's got that careless way about money matters too, that made Fred Hartt liked where I was barely tolerated."

He opened his battered desk, and gazed long and thoughtfully at an old-fashioned photograph of a sweet girlish face,—the woman whom Brewster had loved years before when he was capable of loving something besides current coin of the realm. For the first time in years he allowed his thoughts to travel far afield " 'long the road of memory that leads to yesterday." How well he remembered the incident of the Brown foreclosure, when Fred Hartt had put up the cash to save the widow's property from Brewster's avaricious grasp, which was probably the main reason why Ethel had rejected him and married the generous Hartt.

Times passed on, as the story books say. The purchase price received from Donald had been promptly invested by Brewster in Toronto railway

stock at 79, and now at the end of fifteen years his miserly old eyes brightened as he read the quotation, "190 ask, 189 bid."

Otherwise, there seemed little change. Brewster looked a few years older; his black frock coat was a little more dilapidated, and the shabby room a little shabbier. It was the same room where Donald had called on him and where for fifteen years he had lived like a modern Robinson Crusoe.

For Donald, led by the luring mirage of the golden west, had departed without a thought of his misanthropic tenant, had never mentioned it to the agent, so Brewster had stayed on for fifteen years, undisturbed by any demand for rent, and without acknowledging Donald's title in any way. And now at the end of his fifteen years uninterrupted residence, he sat in the shabby little room, pored over some legal treatises by the light of an ancient kerosene lamp, and keenly considered what legal right he had to the room which he had occupied so long.

He consulted his little law library and read over the dusty volumes far into the night. And his collection of books was not insignificant by any means. Many a student down at Osgoode Hall would have envied them, and Brewster knew them from cover to cover, as far as a layman is able to acquire a correct knowledge of legal principles.

He had remained in possession of the room and occupied it, he told himself, "exclusively, openly, continuously, visibly and notoriously" for fifteen years, during which time he had not paid any rent or acknowledged Hartt's title in any way, and that he knew was sufficient to give a title by "adverse" or "peaceable" possession according to the laws of the Province of Ontario.

There was one point, however, that was not clear. Could he acquire a title to a single room in a building by holding it for the required period, for all that he

had occupied was the one room where he ate, slept and schemed.

The law as laid down in his books was perfectly plain that if he had occupied a piece of land for the same length of time under the same circumstances he would have acquired a good title by adverse possession. There could be no mistake on that point. Then there could be no doubt that buildings attached to the land are regarded as part of the real estate, as laid down by Mr. Joshua Williams in his excellent treatise on "Real Property" and, therefore, it seemed perfectly plain to Brewster that the same rules applicable to the acquisition of a title to real estate would apply to a single room in a building attached to and forming part of the land.

The anticipated return of Donald Hartt was even then an accomplished fact, for the very next morning Fraser MacKenzie, the "dilltanty lawyer," as the old farmer called him, lit a new cigar, swung round in his office chair and blew a cloud of feathery smoke towards the ceiling.

"Tell your story," he suggested, "I'm not so much interested in the law of your case as I am in the merits of it. If a man has justice on his side the law can generally look after itself."

"I'm certainly all right on that score," replied Donald Hartt, positively.

"Go ahead," invited MacKenzie.

"About fifteen years ago," said Donald, "I bought a corner lot and building here in Toronto from an old miser by the name of Brewster. Paid him $20,000 for it, which was about $15,000 more than it was worth Just after I bought I took a notion to go west, so I placed the building in the hands of an agent, and started out. My western experience was the usual story. My money went to the sub-division sharks of Vancouver. Then I tried the gold fields of Nome, and got up against a crooked combination beyond Rex Beach's wildest dreams.

"Finally, I drifted back to Toronto, and found my building steadily depreciating and the rent dwindling every month. But conditions are changing now; and business is coming down MacDonald Street again. The site itself is a very advantageous one, one of the best in the city, and the other day the New Trust Company offered me a big thing for it, $100,000. Enough to keep me comfortable for life."

"Why don't you take it then?"

"That's where I'm up against it," explained Donald. "When I bought, old Brewster was living in a little 'cubby hole' up under the roof, and at his request I let him stay on for a few months, but when I went west, I was so delighted with the glowing prospects of the money I was going to make, that I never thought to say anything about it to the agent. So the old guy stayed on for fifteen years and never paid a cent of rent, or acknowledged my title."

"And now he claims to hold it by 'adverse possession' under the laws of the Province of Ontario," suggested MacKenzie.

"Exactly, and he's warned me that if I start to tear down the building he'll get an injunction to stop me. I wouldn't have minded it so much if the old 'hellion' hadn't laughed and said that anyone so careless as I didn't deserve to have property."

"And that prevents you from selling to the Trust Company?"

"Sure. All they care about is the land, and they plan on tearing the whole thing down and putting up a modern skyscraper, so of course, they wouldn't give $10 for it the way it is."

MacKenzie lit a new cigar and elevated his feet to the top of the desk in a most unprofessional manner.

"Go ahead and tear it down," he ordered.

"Talk enough," agreed Donald with western directness.

The next morning Brewster was disturbed from his pecuniary dreams by what he imagined was a small and incipient earthquake, and rushing down the creak-

ing stairway, he found the preliminary operations of Donald's wrecking crew well under way. His incoherent protest was met by a calm invitation from the foreman to go to his eternal reward, and then minutes later he rushed into the office of one of the leading legal firms in Toronto.

"Get out an injunction quick," he croaked as he recited the facts.

"But ——" began the eminent K.C., who was one of the leaders of the Ontario bar.

"Never mind," snapped Brewster. "You go ahead and get out an injunction. I've read up the law myself and know what my rights are. All I want you to do is to get out the papers and I'll argue my own case, I'm good for your pay."

"Very well," was the calm reply; "we are perfectly willing for you to do so, and we will proceed on the understanding that you take the responsibility, and pay us in advance."

"Just so," declared Brewster. "I know what I'm about."

"Yes," smiled the eminent K. C., "I've seen a good many laymen who thought they did."

Brewster paid over his cash; the papers were duly issued, and when the case came to trial Brewster appeared in court on his own behalf.

"I desire the privilege of arguing my own case," he stated nervously.

He looked decidedly out of place with his ancient frock coat and rusty black tie among the gowned and well groomed lawyers who smiled at each other knowingly. The rare occasions on which the litigant conducted his own case were sure to be entertaining and even instructive at times.

"Reminds me of the time Mrs. Sharp argued her own case against the Gordon Piano Company," whispered Mr. Barton, K.C., to a brother solicitor.

"It is the right of every party to a suit to conduct his case in person if he wishes," said the Judge courteously. "Proceed Mr. Brewster."

"I intend proving," began Brewster, fussily arranging a number of text books on the table in front of him, and reading from a written sheet of foolscap, "that I have held a single room in this building for fifteen years under circumstances which would give me a good title by adverse possession if I had held a piece of land instead of a building."

"We admit that," said MacKenzie calmly, while Donald looked his surprise. Was his own lawyer giving away his case at the outset?

"Then," continued Brewster, "I have a number of law books showing that a building is regarded as real estate, and I contend that a title to part of a building may be acquired in the same way."

"I admit that," interrupted MacKenzie, opening a bulky volume, "and would call the attention of the Court to the case of *Iredale* v. *London*, found on page 313 of Volume 40 of the Supreme Court of Canada Reports, where the Supreme Court of Canada in 1908 decided that a title to part of a building can be acquired in this way. The head note says that 'possession of an upper room in a building supported entirely by portions of a storey beneath may ripen into a title by adverse possession under the statute of limitations."

Brewster smiled tolerantly. The case was simpler than he had thought, and it was certainly easy for an intelligent layman to hold his own against a regular practitioner.

Donald was indignant. He had apparently paid MacKenzie to argue Brewster's case, and he could not help recalling the time when the Vancouver legal firm had sold him out to the Imperial Coal Company.

"Then that being admitted," Brewster continued to argue, "brings me to my second point, which is really covered by the admission, namely, that I, having acquired a good title to this particular room, as is admitted, am therefore entitled to a right of support for my property from the lower part of the building, and Mr. Hartt will be restrained by an injunction from interfering with that right. If I am entitled to

possession I am also entitled to the right of support without which possession would be valueless."

"Pardon me," interrupted MacKenzie, "but the Supreme Court of Canada decided in the case I just mentioned that there is no such right of support, and that an injunction will not be granted. I quote from the judgment of Duff, J., on uage 326.

" 'But the plaintiff has failed to satisfy me,' " MacKenzie read, 'that he has vested in him as the holder of a promissory title to the shop a right of support from the lower storey. The statute of limitations, when the statutory conditions concerning possession are satisfied, bars the right of the owner of the paper title to make an entry or to bring an action for possession, and moreover extinguishes his title. The possession of the intruder is thus protected, but the statute does not annex to a possessory title so acquired any incidental rights. It follows that the plaintiff is not entitled to prevent the defendant demolishing his part of the building merely because some part to which he has acquired a possessory title would thereby lose the support it now receives.'

"This case," MacKenzie went on, " settled law, as far as the highest Court of Canada settles it, that Mr. Brewster has a perfect right to hold his room, and Mr. Hartt has an equally perfect right to deal with his part of the building as he pleases."

"Would you hand up that case, Mr. MacKenzie?" asked the Judge.

"But that is a monstrous proposition," expostulated Brewster, "to give a man a right of possession, and then refuse him a right of support for that possession. You might as well give him a 'castle in the air.' "

"This is probably not the first 'air castle' Mr. Brewster has seen fall," taunted MacKenzie.

"No impudence, young man, no impudence," fumed Brewster.

The Court paid no attention to this outburst, which if uttered by a member of the bar would have called forth a stinging rebuke from the bench.

"It may be an anomalous condition," declared the Judge as he finished reading the case, "but it is the law of Canada, and the injunction is refused."

Brewster gathered up his text books and hurried out of the Court, his frock coat snapping indignantly and a look of baffled rage on his venerable countenance.

"That's the usual result of arguing your own case," was the sage decision of the bar.

"Go to the telephone and tell your crew to go on with their work," advised MacKenzie and Hartt hastened away.

Half an hour later he strolled down MacDonald Street. The foreman of the wrecking crew was already at work and the north side of the building, including Brewster's shabby domicile, fell with a resounding crash.

Brewster came up the street just as Donald stooped down to recover a bunch of papers from the debris.

"You young scoundrel, you thief," flamed the agitated and dispossessed Brewster, "to cheat me out of my rights with the help of a rascally lawyer."

"But I thought you knew enough law to protect yourself," smiled Donald.

"Are you trying to rob me of my papers, too?" screamed Brewster as he caught sight of the documents in Donald's hand.

Hartt glanced at the papers for the first time. The top one was a transfer of a block of "White Cloud" mining stock to John Brewster, and the bold upright signature at the bottom was in his father's familiar handwriting.

"So you were father's old friend who beat him out of his mining stock," remarked Donald.

"It was a fair deal, and he had nobody to blame but himself if he lost. Give me the papers," yelled Brewster, reaching out a trembling hand.

"I think," goaded Donald as he handed them over, "that with the price I am getting for the building, we are just about square."

Brewster did not reply. An old-fashioned photograph fell from the package of papers, and as Donald picked it up to hand it back, the old man reached for it even more eagerly than he had for the documents themselves.

"Mother," exclaimed Donald, as he glanced at it.

Brewster snatched it from him, and one look at his agitated face told the whole story.

"Poor old duffer," muttered Donald as he turned away, "it's poetic justice, but I don't feel like rubbing it in, under the circumstances."

LOCAL AND PERSONAL.

The late commander of the 2nd Divisional Ammunition Columns, Lt.-Col. W. H. Harrison, has entered the firm of Barnhill, Sanford and Harrison, practising at St. John, N.B.

Messrs. Langley and Moore, who have recently gone into partnership at Victoria, B.C., consist of Major W. H. Langley and Capt. H. W. R. Moore, both recently returned from overseas.

OBITUARY.

Ambrose Goodman, LL.B., of the firm of Goodman & Galbraith, who died on September 7th, was well known to the profession in Toronto and the Niagara Peninsula. Before entering into partnership with Mr. Galbraith he was legal adviser on estates to the Union Trust Company.

E. T. Sterrett, District Registrar of Neepawa, survived Paschendale to be drowned in the waters of Clearwater Lake, where he was on his honeymoon.

Major Alan Featherston Aylesworth, better known and popular as Feather Aylesworth, died after a short illness of congestion of the brain. He was one of those who sacrificed a good law practice to go overseas where he continued on duty until the condition of his health necessitated his return. He was the only son of Sir Alan Aylesworth.

Hon. A. G. Cross, justice of the Court of King's Bench, Quebec, who died recently, had been on the bench since 1907. He was a man of many activities outside of his profession—municipal and political—before his elevation to the bench and educational thereafter. McGill University lost a very ardent supporter by his death.

A tablet has been unveiled in the Court House at Moosomin in memory of the following soldiers:—

Lieut. D. Mundell, 5th Battalion, Barrister.
Lieut. R. H. C. Jenkins, 5th Battalion, Barrister.
Lieut. J. W. Montgomery, 46th Battalion, Barrister.
Lieut. W. B. Williscroft, R.A.F., Student-at-Law.
Sergt. M. R. Stewart, 46th Battalion, Student-at-Law.
Lance-Corp. M. B. Duquette, 46th Battalion, Student-at-Law.
Pte. F. P. Cole, 1st C.M.R.'s, Student-at-Law.

In the death of the late J. R. Cartwright, for thirty years Deputy Attorney-General of Ontario, this Province has lost one of its most capable servants and the profession one of its landmarks. He had all the honesty of purpose and zeal for the public service of his fiery cousin Sir Richard Cartwright, but practised also in his relations with the public that old-time courtesy and gentleness of manner which Sir Richard reserved for his private acquaintance.

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THE CANADIAN BAR ASSOCIATION.

Bar Associations, like other learned Associations, always stand in danger of an over-cultivation of the contemplative virtues. The result is that in eliminating the vulgarity of "hustle" they generally become absorbed in their own dignity and moribund in their activities. There is not much danger of this happening to the Canadian Bar Association while under the command of Sir John Aikins, irreverently known in the past as Jam. He is now visiting British Columbia and making a personal survey of legal matters so that the bar of the province will have its difficulties at least understood, which is the first step to being remedied. We reprint his address to the late meeting at Winnipeg and look forward to a greater meeting at Ottawa in August or September, 1920.

ADDRESS OF THE PRESIDENT, SIR JAMES AIKINS, K.C., OF MANITOBA.

Since our last Annual Meeting the great war has ended victoriously for the Allies and peace has been declared.

To the members of the Canadian Bar Association, some of the objects of which are the advancement of the science of Jurisprudence, the improvement of the Administration of Justice, and uniformity of provincial business laws, a consideration of the position in which Canada has been placed by the war and by its results is important. Fortunately it was not by defeat

punished as an evil-doer but by the struggle chastened and, let us hope, strengthened in its virtues. It has sustained losses and has made gains.

Canada's loss of sixty thousand valorous sons may not be calculated in terms of finance; it is too sacred. Neither can the spirit and glory of their heroisms which will be woven into the life texture of Canadians for many generations.

Enormous sums levied by the people on themselves have disappeared and a huge war debt and pension liability has been incurred. It is pleasing to realize that about three quarters of the securities for that debt are held by Canadians, that Canada is learning to do its own financing, and that the habit of industry and thrift resulting from the effort of an ambitious people to pay its obligations will be an inestimable asset.

Some say that as Canada was quite safe because protected by the power and wealth of Great Britain and of the United States its neighbour, it lost the opportunity to make large money out of the necessities of our friends while they fought a common enemy. But by refusing the opportunity it saved its soul and escaped the meanness and contempt of being a national sponger and a parasite, and still better, it gained true nationhood and an open door to national service and greatness, a door pushed ajar by the spirit of the Canadians and the prowess of its sons in 1915 at Ypres, when the astonished foes and the admiring Allies realized a new power had entered the lists. Because Canada maintained the same spirit and prowess to the end it was admitted by the greatest powers to sit with them arranging terms of peace and to sign as a victor the peace pact which the mighty foe submissively in defeat covenanted with it and its friends to keep. Are not the strength and character it achieved in struggle for right's sake and the realization of its nationhood and the recognition of it by all of the other nations, conquerors and conquered, a rich reward for all our pains? May the spirit of service

which led Canada to do the noble thing lead it still in times of peace.

> To the spirit that moves in man,
> On whom all worlds depend,
> Be glory since the world began
> And service to the end.
>
> —Kipling.

Another result of the war has been to create not only among the people of Canada but of all nations an intellectual, temperamental and spiritual ferment.

The passionate and fighting energies created and let loose for purposes of the war, and unspent when it ended, seem to be exhausting themselves on their respective home lands. For the old precept, "Prove all things, hold fast that which is good," is substituted, "Discredit all things, challenge what seemed good."

Mathematics and physics are in danger of losing their reputation for exactitude.

In economics professors have arisen who declare the principles of Adam Smith and Mill are quite unsound. Moral philosophy is being invaded by such revolutionary ideas as "there are no definite absolute rights." In theology creeds are being scrapped, and frequently in lieu of messages of individual salvation, orations are delivered on civic movements and social justice, whatever that means.

In politics strong agitation is made for collectivism and enslavement to system in substitution of individual liberty, and for group or class control in lieu of popular democracy, and for Bolshevism instead of settled national government by the people, of the people, for the people.

Bolshevism is a new name and a recrudescence of an old disease, a frequent consequence of war. For instance, the Jacquerie in 1358, 15 years after the commencement of the One Hundred Years' War, was the same thing under a different name; so also was the Jack Cade rising in 1450 at the close of the One Hundred Years' War. A similar spirit of turbulence was exhibited when the American War of Independence

was over in Shay's Rebellion and the whiskey war. The same thing is seen in the Reign of Terror after the fall of the Bastile in France, and later after the Franco-Prussian War, but under the name of communism.

These and other similar anarchistic uprisings were suppressed and will continue to be overcome by the strong arm of authority, and the good sense and sturdy spirit of the people.

It must not be supposed that all this unrest, and especially the disturbances in industry, are born only of unreason and evil. Life is not static, it is dynamic. Life's purpose is not stagnation, but useful activity, with which unfortunately original sin tampers. As a consequence of vital motion, social conditions and the relation of the people to each other change. New regulations and rules of human conduct or public laws are therefore required. As in nature so in the body politic. Where during growth a mischief develops or defect happens, living forces combine to provide a remedy. In devising such remedies, almost instinctively the trained lawyer turns to some fixed principles (well, almost fixed; everything now-a-days is subject to shaking) and facts established in the growth of our law which he has observed. Some of these are: that every advance in the civilization which we inherit and enjoy and the concurrent laws which express it was gradual, tested by experience and not attained by revolution.

That it is impossible to make once for all, to impose upon a constructive people any conventional law to bind their future activities, and that any attempt to straight-jacket progress in a free country will invite resistance.

That what gives sanctity to law in a democratic country is not the passing of it by a legislature but the fact that it represents the calm judgment of right-minded citizens.

That a method or system of administering the law may be condemned as useless, not because it is intrinsically so, but because those who operate it are ignorant or weak or wicked. That no law or institution which in the past proved useful, capable of expansion, and has vitality, should be discarded but should be modified if need be to suit present requirements.

That fundamental to our civilization and that for which our laws exist is individual liberty and included in it freedom of contract and the right to possess property legitimately acquired.

Individual Freedom of Action.

The essential unit in democracy is the individual upon the proper development and use of whose capacities and powers depend Canada's safety and progress; whose due regard for the rights of others means a nation's internal quietness, and whose right to possess the full fruitage of his honest and well-directed labour and talent is fundamental to the prosperity and comfort of the whole.

Character is a personal achievement and on it depends the spirit and character of the State. Invention is personal. Without it civilization did not and cannot advance. Industry and the habit of it is personal and because it produces competence for the individual and wealth for the nation nothing should be permitted to prevent its steady continuance.

There is danger in these days of excessive reaction against that personal liberty. The German propaganda of State domination for co-ordinate efficiency and of the suppression of individualism and its twin, the Bolshevist doctrine of group or class dictation encouraged (often unconsciously) by pulpit and parlor socialism, and the ever-present indolence of a large element which, artful or ignorant, would feed upon the exertions of others—all these conspire at this time to undermine that stately structure of law built during the passing centuries by noble spirit, wise intellects and

tested experience to protect the rights of freemen in the free nations of our Empire.

From a time when the memory of man runneth not to the contrary customs and laws have existed to limit individual liberty and restrain human conduct, but only to the extent which the people thought it necessary for the liberty of all.

In more recent days, limitation by law has become essential to prevent the power of industrial companies and combines, possessing capital, and federations and unions of people who work with their hands, from being used to the detriment of each other and of the general public, and particularly for the protection of the people who do not belong to such organizations, While law may consider such companies and unions to be artificial units, they are not the human individual. Accordingly, the limitations placed upon them cannot be classed as infringement of personal liberty, but rather as prohibitions against unjust use of collective force. Doubtless, the only way Canada can meet its war debts and compete with other nations in the world's markets and have comfort at home is by uninterrupted industry and thrift. Between organized capital and organized labour, there have been in the work of producing, transporting and marketing, disputes, and will be disputes. To settle these there should be no resort to force veiled or direct, such as strikes and lockouts, which is the principle of defiance or war, but to competent tribunals appointed for adjusting such disputes. That is the method of civilization.

In Australia, that there might be no cessation in industry pending dispute, with its consequent irreparable loss, there was passed at a time when labour, well led, had obtained government control, an Act to provide for compulsory arbitration.

PATERNALISM.

Moreover no student of law can wade through the welter of legislation which every year is being passed

without being convinced that State paternalism is increasing, that government or laws regulating in detail the individual conduct are being substituted for personal character and responsible will, and that socialism is an endeavour to rest everything upon law or government, overlooking the fact that for Canadians the law should fix the minimum demands of social and business duties, and that all requirements between that and the perfect law of liberty should be left to the enlightened conscience and Christian character of the individual. If, in the ultimate, Christian democracy rests upon the moral character and the individual qualities of its citizens, clearly the first aim of all law should be to develop the highest type of human entity, and as far as is consistent with the rights of others leave him unfettered in thought and action.

The Lawyer and Liberty.

From the time of Hampden, himself a trained lawyer, the strong bent of the profession has been to uphold and develop the law of personal liberty, freedom to contract, and the right to hold property, checked only by the reciprocal liberty and rights of others. Burke remarked, of our profession, "They sniff the approach of tyranny in every tainted breeze." Gladstone said: "Law is the venerable emblem of the union of mankind. Its personal agents are hardly less important to the general welfare of society than its prescriptions, for neither statute nor Parliament nor press is more essential to liberty than an absolutely free spoken Bar." A profession that does not correspond to some continuous social need cannot endure and thrive. All people deserve freedom and do stand in need of justice and of law which is its rule, also of the interpreters and ministers of the law who give it motion and efficiency. The lawyer lives because he is needed. He is not a luxury; he is an essential to the life of the community. The dangers of the profession are not from without, but of the internal

decadence. It is true that the anarchistic spirit may compass its extermination. Dick, the butcher, expressed the wish of his class by saying, " The first thing we do, let's kill all the lawyers," and Jack Cade: "Nay, that I mean to do." In the recent Winnipeg strike, a prominent leader said " Damn the lawyers." The answer of law-abiding citizens of his day was to quarter Cade, and the other day to combine and crush Winnipeg's incipient rebellion in the shell.

When the people are prepared for anarchy the lawyers and the law will be disposed of with equal aversion. They are so identified with each other that when the law becomes unsuited to advanced conditions or its administrative procedure dilatory or cumbersome, the lawyer gets the blame and becomes the whipping boy—not always improperly so, for none is and never has been so well qualified to prepare and insist on proper remedies for defects in the law, and on the proper administration.

The common judgment of humanity in democracies justly challenges the Bar who pose as knowing the law and therefore acquainted with its defects and anachronisms, to suggest and create suitable modifications for up-to-date requirements.

In countries despotically governed the duty of the subjects is to keep the law and in other things do as they please, but in a Christian democracy there are for all two civic duties: (1) to be and to do one's best, always regarding of the law as simply a minimum to be observed, and (2nd) to prepare for and take part in the government of the country. To the extent to which those duties are misunderstood and not performed, to that extent popular government is unsafe. To your trained minds the mere statement presents an obvious and important truth.

In these times of unrest and class strife, we are just beginning to realize the force of it, and the fear of its neglect.

Legal Education and Ethics.

As we are ministers or agents of the law, the habit of our thought in all our professional and public activities should be, "Does this serve the State"? To so regard our services is to put our profession on its true and best plane. That habit should be struck in early with our students that they may have the right spirit as well as the trained mind. It is the false notion of democracy that the right to practice law should be free for all, that anyone can practice it, and without serious loss to the public, operate or help to operate the expensive and intricate machinery of justice which the State creates for its safety and well-being. The administration of justice has always touched the nadir of its decline when the profession has been lowest in morals and least educated. In such times there is seen a tendency on the part of practitioners to regard the work of the Bar as a trade and not a profession, a thing to be bartered and not a national service to be sought after; then also is found the petti-fogger, the ambulance chaser, the fabricator of evidence and the trickster, and the man who is alien to the professional spirit and its traditions, destitute of gentlemanly instincts, disrespectful to his seniors, and a slanderer of judges. Students at law should know the ethics of the Bar. Deficiency in legal education also causes serious public injury. How can one not versed in the law and the procedure of courts wisely advise in the one or safely proceed in the other? Who of us has not too often seen through such ignorance needless loss of time and money, to say nothing of the loss of good feeling, from the clients' statements of claim and defences showing no legal wrongs or rights, perhaps ignoring both even where they exist, needless and useless and ill-launched court motions, appeals and examination of witnesses, improper evidence tendered and vehemently urged upon the court, prolonged and lengthy arguments and citation of cases. What clogging of the wheels of justice, what extravagant

abuse of an essential system of justice and court organization, for which the people pay, and this largely through both lack of character and knowledge of the law. How are we to maintain the efficiency of the profession and its honour save by care in selecting those as students who possess the qualifications of mind and character, and then training both with exactitude in the practitioner's office or in the law school, so that they, being masters of their calling, may be happy in their work at the Bar and helpful to the community.

It cannot be expected that the profession will attract those who when trained in the law and practice will make the most useful and successful lawyers unless there are adequate rewards for meritorious services. Such rewards have almost invariably been low, and at these times of soaring values for material things and doubling wages in trades and businesses are, to say the least, meagre. What if the lawyers at the Bar and on the Bench were to combine and strike for higher pay? What riotous joy that would bring to the law-breaker and the anarchist! Notwithstanding frequent jibes, the public regard of the profession is such that even to the veriest Bolshevist the idea is inconceivable. Yet there are individuals and corporations who would treat the members of the Bar as unskilled labourers, and endeavour to secure their highly-trained services at bargain-counter prices. In some cases this has been successful, but not infrequently in the end the most expensive to the client. To guard against clients of that class in most Provinces there are Standard Solicitors' Tariffs indicating reasonable fees as a guide to both the public and the younger members of the profession, and which should be adjusted by the profession to suit the times. An educated and just public opinion will uphold the payment of such fair rewards for meritorious services.

Professional Rewards.

The Canadian Bench, by the high character and efficient work of the judges, has had the confidence of the people; its integrity has not been impeached, yet when representatives of this Association pressed the resolution passed by it urging an increase of salary, they were met by curt remarks from some knocking members of parliament that the judges were well paid for the work they did; that if they did not like their jobs, others would be glad to take them and the accompanying pay; that half the number of vigorous men would be sufficient, while ill-disposed labour agitators point to the judges as examples of wage-earners who work less than six hours a day and 44 hours a week. To us who know their intellectual and experienced service and the hours of work in court and study, the answers to these derogatories are obvious. Even if in individual cases such remarks were not devoid of truth, the remedy lies in reducing the number where there are too many, and in a more careful selection, if they do not possess all the physical, mental and moral qualifications, but not in maintaining discouragingly low salaries, or making any increase an excuse for taking the whole. If, when the judicial compensation is made adequate, the appointing authority would ask the official societies representing the legal profession in each of the Provinces for the names of a number of the leaders of the Bar from whom to select, and would appoint from that number, the Bench would be most ably filled and the Bar would be the interested defender of its dignity and efficiency. In the performance of this highest duty of government so fundamental to a nation's quietness and confidence, the influence of political partisans should be rigourously excluded. If the salaries are adequate and the selection and appointment is made as suggested, from among the leaders of the Bar, the effect will be, as experience has demonstrated, to create a higher type

of barrister and advocate, well skilled in the law, gentlemanly in conduct, kindly disposed to his fellow practitioners and of a public spirit. Generally tending toward the same end will be the frequent meetings of the members of each of the Provincial Bars. None can commend too highly the official law and Bar societies, those bulwarks protecting the people against incompetent and unscrupulous men posing as lawyers, and thus guarding the honour of the profession. Their functions are largely executive. They, however, do not bring together the legal units in the nation undoubtedly influential in the localities where they practice, but whose efficiency for good in advancing jurisprudence, perfecting the laws and the administration of them, and in other ways would be greatly increased by concerted effort. To secure such concentrated action; to support and encourage the excellent executive work of the official law and Bar societies; to develop the co-operative spirit of the profession, Provincial associations have been formed, and this Association was called into existence. Let us hope that in these, all members of the bar, the judges included, will cordially join and co-operate.

The leaven of law-making is working among the Canadian people just as it did among the English in that distant period where the common law grew up. Those to whom the privilege has come of knowing our jurisprudence and laws and their efficacy, and who understand the principles of responsible self-government must unite in so wisely and patiently guiding the law-making multitude that there may be sane and steady national progress and no set-back, and that the noblest purposes and best impulses and finest ideals of the people may be expressed in the rules of conduct or laws which they are making for themselves. Thus will our profession do its essential part in the realizing by Canada of that larger nationhood to which, by the worthy aspirations, energy and sacrifice of its people, it has been admitted by the great world powers.

OUR LONDON LETTER.

44 Bedford Row,
London, W.C. I.,
12th September, 1919.

The Editor,
"Canadian Law Times,"
Toronto.

SIR,—The appointment of Lord Grey, of Falloden, to go " on a mission to Washington to deal specially with questions arising out of the peace " will give the utmost satisfaction to every well-wisher of the League of Nations. Lord Grey has been one of the most ardent workers in the difficult task of creating a public opinion in favour of the League and the principles for which it stands. In a memorable meeting held in London in June last he declared that " the whole of Europe cannot make the League of Nations a living pact without the support, sympathy, and co-operation of the great nation on the other side of the Atlantic."

The effect of the war upon the work of the civil Courts is further shown by the volume of Judicial Statistics just issued. The total number of proceedings begun in the various Courts from the County Courts to the House of Lords in 1917 was 666,736, nearly 200,000 below the number in the previous year. A comparison of these figures with those for 1913, when 1,355,186 proceedings were begun, shows that the war has deprived the Courts of more than half their work. For this decline, the County Courts, where the business is enormous, are mainly responsible.

The Matrimonial Causes (Dominion Troops) Bill, to which I called attention in a previous letter, has now received the Royal assent. This Act was passed to enable matrimonial proceedings to be brought in the United Kingdom in respect of certain marriages contracted during the war by members of His Majesty's forces domiciled outside the United Kingdom. In

ordinary cases the test of jurisdiction in suits for dissolution of marriage is the domicile of the parties at the time of the presentation of the petition, and in suits for judicial separation or for restitution of conjugal rights, the residence of the parties at that time. If, therefore, a member of the Dominion forces married an Englishwoman here during the war and afterwards returned to his own country leaving her here, she could not, in the ordinary course, obtain relief in our Courts. The new Act meets the case. It should be noted that it only applies where the marriage (1) was contracted in the United Kingdom; (2) during the war; (3) by a member of His Majesty's forces domiciled in a place to which the Act applies, and (4) where the proceedings are commenced before the 22nd July, 1920. The Act does not apply if the parties have at any time after the marriage resided together in the country of the husband's domicile. It is also important to note that to bring the Act into operation as regards persons domiciled in one of the self-governing dominions, the legislature of that dominion must adopt it, and that as regards persons domiciled elsewhere in His Majesty's possessions an Order-in-Council applying the Act to the place in question must first be made. The Act does not apply to nullity proceedings, as such proceedings can be brought if the petitioner is resident here, although the respondent is abroad.

A Bill has been introduced into the House of Commons providing for the compulsory retirement of county-court judges. The age fixed is 72 years, but this may be extended to 75 years if the Lord Chancellor considers that the retention of the judge's services would be desirable in the public interest. The age is not so low as the limit of 70 years which has recently been introduced for London Police Court magistrates. Much difference of opinion exists as to the desirability of fixing a time limit for judicial office. When the subject was discussed in 1913 in the proceedings of the Royal Commission on delay in the King's Bench Divi-

sion, both Lord Alverstone, then Lord Chief Justice, and Lord Phillimore were opposed to it.

The Ministers' and Secretaries' Bill, the second reading of which was carried in the House of Commons despite serious opposition, and to which I referred last month, contains a provision of interest to students of the constitution. The Bill provides that the powers of the Secretary for Scotland shall be transferred to one of the principal Secretaries of State whose numbers are to be increased from five to six; in other words, the office of Secretary for Scotland is to be raised into a principal Secretaryship of State. It will be remembered that the Union of England and Scotland in 1707 into the Kingdom of Great Britain was, unlike that of Ireland and Great Britain a century later, an executive as well as a legislative union. With the dissolution of the Scottish Parliament the whole business of government was transferred to London and entrusted to a third Secretary of State appointed to take charge of Scottish affairs. This arrangement continued until 1746, when the office of Secretary of State for Scotland was abolished. Thenceforward, until 1885, the connection of Scotland with the central government was maintained chiefly through the Home Office, but the labours of that already heavily burdened department were relieved in this respect by the assistance rendered to it by the Lord Advocate. The Lord Advocate is the first law officer of the Crown in Scotland, corresponding to the Attorney-General in England, and he added to his duties as a law officer those of a Parliamentary Under Secretary to the Home Office for Scotch business. In 1885 a Secretary for Scotland was appointed, and in his office is concentrated the business relating to Scotland which had before been transacted in various departments. Though he keeps the Great Seal of Scotland, the Secretary is not a Secretary of State, but a representative for local purposes of the various departments of government. In Ireland, on the other hand, there has never been a system whereby the whole business of government was

transferred to London. The Irish Executive has always been distinct, at least outwardly, from that of the rest of the United Kingdom, the government being vested in the Viceroy, assisted by a Privy Council, although for all practical purposes it is conducted by the Chief Secretary to the Lord Lieutenant.

Stubbs, Ltd. v. *Mazore* is a case of some importance. A well-known trade gazette placed the plaintiff's name in what is popularly known as the "black list," stating that a judgment by default had been recorded against him. The proprietors of the paper relied on the defence successfully pleaded in *Russell* v. *Stubbs*,[1] in which the House of Lords held that a notice at the head of the "black list" that in no case did publication of the name imply inability to pay, protected them from liability. In this case, however, the Lords upheld a verdict and judgment of the court of first instance for £50 damages. "It is one thing," said Lord Finlay, "to impute insolvency, it is another to say, as was said here, that the plaintiff was given to refusing, or had begun to refuse, or to delay to make payment of his debts."

Lord Halsbury, who has just completed his ninety-sixth year, is not the only notable lawyer of our time who is a nonagenarian. Lord Lindley, whose judicial qualities will always be remembered by English lawyers, completed his ninetieth year in November last, and Sir Harry Poland, who has played so eminent a part in the administration of the criminal law, attained the same age in April.

Dr. T. J. Lawrence, the well-known writer on International Law, died in London on the 16th August in his seventy-first year.

Yours, etc.,

W. E. WILKINSON.

[1] (1913) A. C. 386.

DIVORCE.

In the last session of the Dominion Parliament a Divorce law was introduced by the then very active, but now totally extinct Mr. Nickle, of Kingston. This law seemed to be generally approved in principle and assured of a place upon the statute book. But the session closed, Mr. Nickle retired, and his favourite child apparently wandered across the bridge to Hull, among the unsympathetic inhabitants of Quebec, and has not since been heard of.

We should suggest an advertisement in the *Detective Magazine* or *Adventure*:

"Divorce Bill, a clamorous infant much inquired after by returned soldiers, and missing since the summer from Parliament Hill, Ottawa. Finder can leave same with Clerk of the House of Commons after hours. No questions asked."

In the meantime we notice from our London Letter that the Old Country is trying to help us out in a left-handed way by infringing our jurisdiction and issuing soldiers' divorces in England, although the men themselves have returned to Canada.

The whole divorce situation is one highly discreditable to the Government of Canada and the House of Commons, and the public should be made to understand the situation and the reason why our law-makers are too cowardly to act.

COPYRIGHT: EATING THE CHERRIES AND CATCHING THE STONES.

There is a good deal of labial sympathy for the smaller nations just as there is for the minority shareholder. In the matter of copyright, the British Dominions are rather in a worse position than the small nations. The writers of these nations have a literary market of their own which, although small numerically, is protected by the local peculiarities of language and custom of which the native writers are the natural interpreters. But the British subject writes for all who read English, and is in competition with all who write English.

Accordingly an "American" attitude is of no protection to him if his own Dominion adopts it (for the reading public declines to limit itself to a small circle of authors), and is a constant embarrassment when persisted in by the United States. The situation is one which calls—and in vain—for generosity on the part of the by-fellows. It is like our old days on the farm, when the two older boys climbed the cherry tree, and now and then dropped the stones and the wormy fruit to the little fellows on the ground.

Apparently Australia is even harder hit than ourselves, as witness this dignified complaint by the Sydney *Morning Herald*:—

"COPYRIGHT LAW."

Mr. C. J. Dennis, the creator of the Sentimental Bloke and other Australian celebrities, has drawn attention to an extraordinary lack of reciprocity between the copyright laws of the United States and Great Britain. To put the case briefly, the American author can secure protection for his book throughout British territory by the simple expedient of having one copy sold at one British counter. The British author, on the other hand, has a harder row to hoe. Before he

can gain copyright in America he must not only have had his work set up, printed, and published in the United States, but this must be done within a time limit, which imposes an almost insuperable handicap on his original publishers. One does not need to be very old to remember how British authors suffered from the enterprising literary pirates in America, mushroom publishers who brought out contemporary successes in cheap editions (as well they might, with no royalties to pay), and spoiled the oversea market of such writers as Stevenson and Henley. The unfairness of the present American copyright law has been admitted by American publishers, who nevertheless continue to profit by its provisions. They claim that they cannot remedy the injustice, and that for this discrimination not they, but the Labour Unions, are responsible. The American unions concerned in the book-making trade have set their ban upon imported books; they must have their share in the mechanical production of literature before it can be permitted to reach their fellow citizens. This policy may be narrow, reactionary, and disastrous, but it has effected one result for which its originators hoped. Several English publishers have now American houses in order to fulfil the conditions of copyright. Others have connections with American firms, which enable them to get protection. But these are in a minority, and the fact remains that the British author is sadly handicapped by comparison with the American. The Australian author suffers a greater disability than any. As long as there was no Australian literature which had a great appeal outside Australia and the mother country, this did not matter. But now America has "discovered" Australia, and has found that both have much in common. The race that has produced the Anzacs is a good field to exploit; but the Australian author and the Australian publisher cannot hope to get into the American market except under conditions involving great and very unfair expense. Copyright

is an international affair, and perhaps the League of Nations may put it on a different basis. But along whatever path the remedy is found, we hope that there will be some consistency between the policy of the nations. The Australian author has a hard enough time as it is, without losing the fruits of his toil through such flagrant anomalies as those mentioned by Mr. Dennis.

VISCOUNT FINLAY.

His Two Addresses to the Canadian Bar Association, Chiefly Concerning Certain Phases of International Law.

I. His General Address.

Gentlemen.—Will you allow me in the first place to express to you my strong sense of the honour you have done me in inviting me to take part in this meeting of the Canadian Bar. This is my first visit to Canada, and it could not have been made under better auspices. Indeed, I feel that in Canada I am not altogether a stranger. For many years past it has been my privilege when at the Bar to meet before our great Imperial Tribunal—the Judicial Committee of the Privy Council—many members of your Bar, and I value more than I can tell you the good feeling springing from our intercourse in London on such occasions which has prompted you to invite me to this great gathering. I may add that I almost feel as if visiting a country to a great extent already known to me. I think I have had the honour of conducting cases at the Privy Council on appeals from all provinces of this great Dominion. Though I have never on any previous occasion crossed the Atlantic, in spirit I have visited every part of it, and from whatever province an appeal was going on, I almost felt as if for the time my domicile were there.

I had the honour of having as my fellow passengers across the Atlantic a large body of Canadian soldiers on their way back to their homes. Your troops have indeed covered themselves with glory. They inspired the Germans with a most wholesome dread of their prowess, and in every British household the records of their daring, their constancy and their successes have been read with pride and with exultation. Your fellow countrymen in England recognize to the full what they owe to Canada.

The great war from which we have just emerged triumphantly, has indeed made us realize, as we never realized before, the essential unity of the British Empire, that great fact in the History of the Nations. In old days we used to hear criticism as to the slightness of the tie which holds the Empire together. Where are such criticisms now? The War has made us realize that the strength of the bond that unites us is that it is not too rigid. Outside of the British Isles the Empire comprises a group of mighty nations, great already, and destined to become still greater in the future. The mere looseness of the constitutional tie is what makes it so strong. We are united in devotion to the King, the head of the Empire, in the love of freedom, and in the determination to hand down unimpaired to our children that magnificent heritage which our ancestors have bequeathed to us. During this War we have learned to appreciate as we never before appreciated the value of the Crown as the golden link of Empire, and all alike revere the King as at once the symbol of the essential unity of the Empire and the bond which secures it. Never has there been a welcome more enthusiastic than that extended by the people of the Dominion to the Heir to the Crown now among us!

Many proposals have been made for drawing closer the legal and constitutional ties between the different parts of the Empire. It is interesting to recall the suggestion made on this subject by Adam Smith in the "Wealth of Nations." That great work appeared in March, 1775—the year in which, some months later, the Declaration of Independence of the American Colonies was made. Adam Smith was writing at the time of the difficulties between the Mother Country and our Colonies which ended in the establishment of that mighty Republic which has in this War thrown its vast resources into the struggle for freedom and civilization now so triumphantly closed. He proposed as a solution of these difficulties that the Colonies should be represented in the Imperial Parliament.

"The Assembly," he said, "which deliberates and decides concerning the affairs of every part of the Empire in order to be properly informed ought certainly to have representatives from every part of it." He pointed out that objections might be raised to any such scheme by those on the other side of the Atlantic, on the ground of their distance from the seat of Government, but he observed that time might cure this difficulty by the natural transfer of the seat of Empire from Great Britain to America as the latter increased in wealth and importance. It is indeed interesting for us in the year 1919 to recollect what Adam Smith said on this subject in 1775: "The distance of America from the seat of Government, the natives of that country might flatter themselves with some appearance of reason, would not be of very long continuance. Such has hitherto been the rapid progress of that country in wealth, population and improvement, that in the course of little more than a century perhaps the produce of America might exceed that of British taxation. The seat of the Empire would then naturally remove itself to that part of the Empire which contributed most to the general support and defence of the whole."

It would be difficult for most Britons to contemplate this solution with the philosophic serenity with which Adam Smith propounded it, and I think we may say that we have found a more excellent way. We have moved far since 1775, and the War has made us realize more than before from what point the question of closer union should be approached. You all know what a great part Canadian Statesmen have played in the Councils of the Empire during this war. Sir Robert Borden has returned to Canada after conspicuous service to the Empire during nearly the whole of that momentous struggle which has just ended. Those meetings of the Statesmen of the various parts of the Empire will, we all believe, be continued, and out of them will grow a permanent Council for Imperial Affairs. This is the solution to which Lord Beaconsfield—Mr. Disraeli

—pointed in a speech made so long ago as June, 1872. While the Parliaments remain separate (and for myself I may say that I regard the difficulties in the way of fusion of Parliaments as insuperable) the Empire will be the gainer by the fact that Canada with the other great Dominions has a permanent place in Council in matters that affect the common interests of all.

In an Assembly like this of Lawyers, I cannot fail to say a few words on one Imperial Institution which is a striking illustration of our unity. The Judicial Committee of the Privy Council is in itself a most notable link of Empire. I should recommend any foreigner who visited London and wished to have some idea of what the British Empire is, to spend some days in making acquaintance with the work of the Judicial Committee. He would hear argued and decided cases coming from every quarter of the Globe. The systems of law which are there administered are many and various. The problems presented before the Tribunal vary infinitely. Many races, many religions, many stages of civilization, pass in review before the Judicial Committee, and in the Chamber where it sits the foreigner will get a vivid idea of the vastness of the Empire, and will realize that it rests upon the adoption and maintenance of Local Laws, upon respect for the religions of all, and upon that freedom which British Rule has ever carried with it. I believe that Canada appreciates to the full the advantages which flow from the appeal to the King in Council. May I add the expression of a pious hope that a Court so great may before long be more worthily housed? When the other day by the courtesy of the Chief Justice I was taken over the Law Courts in Winnipeg I felt that we in England have a great deal to learn from you in such matters. I wished I could transport your buildings to London.

The opinion has been sometimes expressed that the House of Lords enjoys a position in some way superior to that held by the Privy Council. This is based on the idea that as the House of Lords has on

some occasions declined to follow opinions expressed in judgments of the Privy Council, it is to be considered as more emphatically a Supreme Tribunal. This view proceeds from a misapprehension. Each of these two great Tribunals is supreme in its own province. The Judicial Committee is the final Tribunal for deciding questions of law from every part of the Empire outside of Great Britain, and no appeal lies from its decisions, and the House of Lords, of course, recognizes them as final. It sometimes, however, may happen that the Judicial Committee, in ascertaining the law applicable to the case under appeal, may refer to its view of English or Scottish law upon the point as a reason for the conclusions at which it arrives. Such a view is, of course, not binding on the House of Lords, or indeed on any English Tribunal, any more than a statement as to the law (say) of Canada or Australia made in the House of Lords, by way of illustration of an English or Scottish case, would be binding on the Judicial Committee when they have to decide a Canadian or Australian appeal.

The Judicial Committee is in every sense of the word a Supreme Tribunal, without any superior in dignity and importance. When appeals are brought before the King in Council, it is recognized, I think in all our Dominions, as it is in Great Britain itself, that there is no more august tribunal in the world.

I do not propose to enter into the question, on which a great deal has been said, of replacing both the House of Lords and the Judicial Committee by a new and Imperial Tribunal. My own impression is that we should be cautious about making experiments in this direction, and that if any such change were made we should be fortunate if we found that under new names we had tribunals as effective as those which have so long acted as our Supreme Courts of Appeal.

When we turn from the internal affairs of our Empire to a consideration of the relations of nations to one another, and of international law, we cannot fail to be impressed by the profound effect which the

War has had upon them. It is not too much to say that this War threatened the entire abolition of all International Law. If Germany had triumphed, treaties would have become mere scraps of paper; the right of the strongest would have superseded all those rules which for centuries have been recognized as International Law, and which, with indeed an imperfect sanction, have had for their object the mitigation of the horrors of war. If the Germans had had their way, we should have witnessed the substitution for any system of International Law, of what is the German code upon the subject, expressed in anticipation by the poet Wordsworth in the words he put into the mouth of "Rob Roy," the Highland freebooter:—

> "The good old rule
> Sufficeth then, the simple plan
> That they should take who have the power
> And they should keep who can.
>
> "All freakishness of mind is checked,
> He tamed who foolishly aspires,
> While to the measure of his might
> Each fashions his desires."

International relations would have become a scramble of wild beasts, and the post of Professor of International Law would have been almost a sinecure.

Grotius in the preface to his immortal work "*De Jure Belli et Pacis,*" tells us that it was the spectacle of the horrors presented by the 30 Years' War that led him to write upon the Law of Nations. He says that he had many and grave reasons for drawing up a statement of that "*jus commune* which is a force with regard to war and in war," and he gives his reasons for undertaking the task in the following memorable words (I quote from Dr. Whewell's translation):—

> "I saw prevailing throughout the Christian World a license in making war of which even barbarous nations would have been ashamed; recourse being had to arms for slight reasons or no reason; and when arms were once taken up all reverence for Divine and human law was thrown

away just as if men were henceforth authorized to commit all crimes without restraint."

The original is even more emphatic. Its language is so terse and nervous and is so applicable to what we ourselves have witnessed during the last four years that I may be pardoned for quoting it:—

> *"Videbam per Christianum orbem vel barbaris gentibus pudendam bellandi licentiam, levibus aut nullis de causis ad arma procurri, quibus semel sumtis nullam jam divini, nullam humani juris reverentiam, plane quasi uno edicto ad omnia scelera emisso furore."*

These words were written of the Thirty Years' War in the 17th Century. Could there be a more perfect description of German methods in the twentieth? Fortunately Germany has been defeated. The catastrophe of a return to barbarism has been averted and International Law still breathes!

It is interesting to recall, in view of recent discussions in Paris and throughout Europe, that Grotius, the father of International Law, was an ardent advocate of International arbitration as a means of preventing war.

He says that Christian Kings and States are bound to take this means for avoiding recourse to arms, and he goes on to use language of which what we have heard lately at Paris and throughout Europe is an echo:—

> "And both for this reason and for others, it would be useful, and indeed it is almost necessary, that certain Congresses of Christian Powers should be held, in which the controversies which arise among some of them may be decided by others who are not interested; and in which measures may be taken to compel the parties to accept peace on equitable terms."

The aspirations of Grotius in this respect have in the Covenant of the League of Nations received an

extension beyond his most sanguine hopes. Let me remind you of the objects of that Covenant as recited in the document itself which stands in the forefront of the Treaty of Peace. They are:—

> "To promote international co-operation and to achieve international peace and security
>
> by the acceptance of obligations not to resort to war,
>
> by the prescription of open, just and honourable relations between nations,
>
> by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and,
>
> by the maintenance of justice and a scrupulous respect for all Treaty obligations in the dealings of organized peoples with one another."

For these high purposes it is agreed that armaments are to be reduced and that any danger of war shall be a matter of concern to the whole League. Differences between nations are to be settled by arbitration or by the Council of the League. There is to be—and to this I call your particular attention—a Permanent Court of International Justice for the settlement of International Disputes, and that Court may also give advisory opinions on any questions referred to it by the Council or by the Assembly of the League. Provision is made for the Revision of Treaties and for the issue of Mandates for the tutelage of less advanced Races which have hitherto too often been the prey of the stronger.

This Covenant marks, we hope, the opening of a new era. With what feelings would the father of International Law have hailed the dawn of what we trust is a brighter day in the history of the world. The weak point about International Law has always been the absence of any effective sanction to ensure its observance as between nations. If the League of Nations be worked in a manner worthy of the spirit in which it

has been framed, the Court of International Justice will have behind it forces which hardly any will dare to defy.

The principles of International Law are immortal, but this war has raised new questions as to their application. To some of these questions I desire briefly to draw your attention.

New spheres of warlike activity in the *air* and *under the surface of the sea* have been developed and changed circumstances have raised *new problems as to war on sea and on land.* You will, I hope, pardon me for directing your attention in short compass to some of these matters under the three heads that I have mentioned:—

I. I propose first to deal with the AIR, the most novel and not the least interesting sphere of warlike operations.

Man's mastery of the air has during the last five years advanced by leaps and bounds. The idea that man might fly was long regarded as appropriate only to the region of fable. *Expertus vacuum Daedalus aera Pennis non homini datis.* You may remember that in "Rasselas" Dr. Johnson introduces an artist who laboured under the delusion that he had mastered the art of flight and offered to initiate the Prince into his secret on condition that he should promise never to divulge it. "Why," said Rasselas, "should you envy others so great an advantage?" "If men were all virtuous," returned the artist, "I should with great alacrity teach them all to fly. But what would be the security of the good if the bad could at pleasure invade them from the sky? Against an army sailing through the clouds neither walls nor mountains nor seas could afford security." "The Prince promised secrecy and waited for the performance, not wholly hopeless of success. In a year the wings were finished, and on a morning appointed the maker appeared furnished for flight on a little promontory; he waved his pinions a while to gather air, then leapt from his stand, and in an instant dropped into the lake. His wings, which

were of no use in the air, sustained him in the water, and the Prince drew him to land half dead with terror and vexation."

I remember well how an expert in patents expressed to me his regret that a great inventor was turning his attention to flying—a mere waste of time my friend thought, as the problem was impossible of solution. How far have we travelled since then! "The nations' airy navies grappling in the central blue"—the dream of the poet—has become a terrible reality. The Air has been conquered for the purposes of War and of Peace, and International lawyers are busy in drawing up codes to regulate its use.

At the meetings of the Institute of International Law in 1902 and 1911, there was raised a fundamental question as to the extent of sovereignty in the air above any territory. Has the sovereign power of any country the right to treat it as an invasion of its sovereign rights, if any airship passes through the air above that country without the leave of its rulers? There was much controversy on this subject, but it is now settled that the answer must without any doubt whatever be in the affirmative.

Light upon this question was sought by the consideration of the rights which a private owner of land has with regard to the air above him. Lord Ellenborough, in a case tried before him at *nisi prius*, said that it was not a trespass to interfere with the column of air above any close, and added that if it were it would follow that an aeronaut is liable to an action of trespass at the suit of the occupier of every field over which his balloon passes in the course of his voyage. He added that if any damage arises from such transit over the close, the remedy would be by action on the case, not by action of trespass. Mr. Justice Blackburn said with regard to these remarks of Lord Ellenborough, that he understood the good sense of his view, but not the legal reason for it. There is a great deal of authority on the subject which is collected in a most interesting work on the "Law of the Air," first pub-

lished in 1911, by Mr. Harold Hezeltine, professor of law at the University of Cambridge.

Whatever in point of strict law are the rights of the owner of land in England with respect to the air above it, it is out of the question that any one owner should have it in his power to prevent the passage of airships through the air over his land, unless indeed it takes place near the surface or otherwise under such circumstances as to amount to a nuisance. The practice of aeronautics is recognized as essential to the safety of the country, and if any cantankerous owner showed a disposition to carry the rights of property in this respect to their logical conclusion by stopping aviation, a remedy would doubtless be found if necessary by legislation supplementary to that already in force. But no such considerations apply in favour of authorizing any interference with the control by a State over the air above its territories. It is essential for the safety of any territory that the Sovereign power should have complete control of the air over it. The principle is the same as that which gives control over what are known as the Territorial Waters; it is necessary for national safety. It has been urged that as the ocean is free to all, the air should be free also to all. There is no analogy whatever in such matters between the air and the ocean. The conditions are absolutely different, and the difference has been recognized in practice throughout this War. It has been admitted over and over again that it is an infringement of the territory of a neutral that a belligerent airship should pass through the air over it. During the recent War this has been uniformly asserted and never contested. From aeroplanes bombs might be dropped, and the safety of the country demands that its Government should have the right to prevent all passage by alien aeroplanes over its surface. It may be conceded that it is desirable that the right to innocent passage through the air should be granted to the subjects of friendly nations. But the right of granting or withholding such consent must be vested in the Sovereign

of the territory in question. He may in the absence of Convention impose upon the grant of a license such conditions as in his absolute discretion he thinks proper. Conventions on this subject have been made and no doubt will be made in future—the Treaty of Peace with Germany supplies an example—but the right of passage must in every case depend, apart from Convention, upon the pleasure of the sovereign power. The 1st Article of the Convention as to the Air, recently agreed by Representatives of the Allied Powers, which has been published and now awaits ratification, provides that "every State has complete and exclusive sovereignty in the airspace above its territory and territorial waters." The Convention goes on to make provision for according in time of peace freedom of innocent passage, subject to the conditions prescribed by its articles.

In connection with aviation some questions of International Law have been raised which are curious, perhaps, rather than important. A code was, I am informed, actually drawn up with regard to the air which contains provisions for determining the nationality of children born in an aeroplane, and perhaps some future jurist may make provision for the celebration of marriage under such circumstances. I read a few days ago that such a marriage had taken place and perhaps the fields of air may in the future replace the Gretna Green of the past.

It is impossible to touch upon the subject of the air in war without referring to air-raids as we have known them in England. With such raids London during the War became painfully familiar. It was an education for the people of London as to German methods of warfare. I happen to know of the case of a child of very tender years, who had been born shortly after the commencement of the War, to whom her mother was explaining as she best could during a thunder-storm what a thunder-storm is. The child said: "I suppose it is a sort of air-raid in the skies." Five years ago who would have dreamed that English

children would be more familiar with bombs dropped from aeroplanes than with thunder-storms, and that a little girl should recur to her recollection of air-raids to form an idea of the rationale of a thunder-storm? War is indeed a strange schoolmaster!

These air-raids were not carried on for military purposes. The pretence that they were was a piece of transparent hypocrisy. Such raids had no analogy with the bombardment of a besieged fortress with a view to compel its submission. Neither London nor any of the British towns victimised by such outrages were ever besieged. Indeed a siege by aeroplane is impossible. The real object was to cause destruction, and, by destruction of human life and property, to induce panic in the population. Such enterprises are branded by International Law as wholly unjustifiable and we may look forward to precautions being taken in the way of International agreement for the imposition of the severest penalties for outrages of this description, so as to render them impossible in any later war. The murder of women and children, and the wanton destruction of property not demanded by the necessities of war, can never be justifiable. Such outrages would inevitably lead to reprisals and it is shocking to think of a war conducted systematically by these methods. I cannot do better than quote in this connection the words used by Sir Erle Richards, the Chichele Professor of International Law at Oxford, whose acquaintance many of you have no doubt made at the Bar of the Judicial Committee of the Privy Council. In a Lecture delivered before the University of Oxford on "Some Problems of the War" so long ago as the 30th October, 1915, Sir Erle Richards said:—

> "If the indiscriminate murder of the civil population and the general destruction of civil property is to continue, then in future wars we should have every belligerent equipped with a fleet of air-

ships and the inhabited portions of every enemy territory will be ravaged by bombs dropped from the clouds. The aim of the laws of war has been to alleviate as much as possible the calamities of war and to confine the military operations of belligerents to the weakening of the military forces of the enemy: to spare non-combatants in the interests of humanity. But this kind of warfare is a complete reversal of that policy."

By its air-raids Germany succeeded in this last war in throwing into the shade the horrors of the Thirty Years' War. The universal abhorrence which these methods excited in every quarter of the globe should secure the world against their repetition.

II. I turn to the subject of SUBMARINE WARFARE which has of late assumed such prominence. There is, of course, no objection from the point of view of International Law, to the employment of submarines for the destruction of the enemy's vessels of war, but there is every objection to their employment for the destruction of merchant vessels.

The merchant vessels of the enemy are subject to capture and condemnation as prizes. But the destruction of such merchant vessels is not permitted except under very special circumstances, and then only when the safety of the crew and passengers can be secured. To sink such a vessel without warning is mere murder. You all remember the thrill of horror which went through the world when the "Lusitania" was sent to the bottom by German torpedoes. It is strange indeed to reflect that the news of this great crime was received with rapture and exultation in Germany, and it is even said that the Iron Cross was bestowed upon the criminals. If this be true, the Iron Cross has indeed become a badge of infamy. Even when warning was given, it was an outrage to sink a merchantman in mid-ocean. The sufferings imposed upon the crews and passengers who had to take to the boats are

untold. How many women and children must have died of cold and exposure!

It must be remembered that the sinking of British merchantmen by German submarines was carried on systematically. It was a new form of wickedness and was regarded by popular sentiment here as piracy. The fact that this wickedness was perpetrated under the orders of the German Government prevents it from being piracy in the eye of the law. The essence of the crime of piracy is that it is carried on by persons not authorized by any established Government. This is, however, a crime which no order ought to be allowed to justify. It is to the shame of Germany that such orders were given, and it must be part of the Law of Nations for the future that those who obey such orders cannot plead them as exempting them from the doom of pirates.

What I have said on this topic applies with even greater force if the merchantman sunk be a neutral. If a neutral vessel be engaged in carrying contraband or in running a blockade, it may be seized and condemned, but the Germans systematically sent neutral vessels to the bottom, if they regarded them as engaged in trade with this country or in any traffic which could be for the benefit of the Allied Powers.

It is a fatal objection to the employment of submarines against merchantmen that a submarine in practice cannot take prizes. She can destroy but she has not the means of bringing any vessels into port for trial and condemnation in due course of law. This consideration is enough to stamp the employment of submarines against merchantmen as unlawful.

III. I pass on to consider certain PROBLEMS which have come to the front during the recent war as regards the conduct of hostilities both on land and by sea.

We have heard a great deal lately about the "Freedom of the Seas." It is urged by some that such freedom does not exist unless it is recognized that private

property cannot be captured at sea. I do not pause to consider how far it is true that private property is exempt from seizure on land. Very slight enquiry would reveal a formidable list of exceptions to the supposed immunity. But this mode of stating the question involves a misconception. The property of the enemy is seized at sea, because this is the only means of preventing the enemy from carrying on trade during war. It is one of the most effective means of crippling the enemy that his commerce should be destroyed. The only available means of preventing the enemy from increasing his resources during war by commerce is by rendering enemy property found at sea liable to condemnation. The capture of private property is not an end in itself. It is merely the means, and it is the only means, of preventing the enemy from enriching himself by trade during war. The enemy is not permitted to carry on trade on land during war. Its prohibition by land and by sea is one of the most potent weapons for reducing the enemy to submission as has been shown by the experience of all wars and very notably by what has happened during the war which has just ended.

It appears to me to be a mere dream to suppose that trade can go on unfettered during war precisely as in peace. Let us concentrate our energies on securing that the means used to check enemy trade shall not be inhuman, but shall be in conformity with the well understood rules of International Law. Liability to capture and condemnation is the true and only sanction. Freedom of the seas consists in making it impossible that in the endeavour to check enemy trade such murderous means should be employed as those with which the Germans during this War have made us so painfully familiar. Do not let us lose the reality in pursuit of a phantom.

The effect of the War upon the rights and liabilities of neutrals depends very largely upon the doctrine of CONTRABAND OF WAR. No subject has bulked

more largely in Treaties on International Law in time of war than that of contraband. The principles which have been laid down are sound, but the experience of modern conditions of warfare shows that there must be some modification of the canons which have hitherto governed their application. The experience of this war has brought out very clearly two points:

(1) The great difficulty which exists under modern conditions as to carrying out in practice the distinction between conditional and absolute contraband, and

(2) The necessity of having regard to the ultimate destination of the goods, or as it is sometimes called, the doctrine of continuous voyage.

I desire to say a few words upon these two points. It is to Grotius that we owe that threefold division with reference to questions of contraband which is now so familiar. "In the first place," he says, "we must make a distinction as to the things supplied. For there are some articles of supply which are useful in war only, as arms. Others which are of no use in war, but are only luxuries. Others which are useful both in war and out of war, as money, provisions, ships and their furniture."

The first observation to be made with regard to this division, is that the application of science to warfare, which has been so strikingly exemplified during the recent war, has greatly increased the number of articles which have now become *ancipitis usus*. The progress of invention, especially with regard to high explosives, has led to the use of many substances formerly regarded as innocuous, for the purpose of the manufacture of munitions of war, so that articles falling under the third head in the classification of Grotius are much more numerous now than they were even in very recent years.

It is thoroughly well established that it is not in any way contrary to the law of nations for the subjects of a neutral state to supply contraband of any kind to a belligerent, but he does so at the risk of seizure

and condemnation. The Government of the neutral country may not itself lawfully supply contraband to the belligerent, but it is not bound to prevent its subjects from engaging in such trade. It is indeed a matter of common knowledge that the supply of ships to a belligerent has been specially delt with by the legislatures of Great Britain and of other countries. But the exception is more apparent than real. Ships of war in this matter stand by themselves, for in truth the supply of ships of war in many respects tends to assimilate itself to the fitting out of expeditions in a neutral country, which is of course forbidden by international law. This is the real explanation of an apparent anomaly. But while a neutral is at liberty to supply a belligerent with articles of contraband, the other belligerent is at liberty to seize the goods if he finds them in transit upon the high seas. He has of course to show that they are intended for the enemy. If the ship is bound for an enemy port this does not admit of much doubt, and in the old cases the test of the destination of the ship was accepted as sufficient for the purpose of determining the destination of the goods. But the inadequacy of this test is apparent. Goods may be transhipped and the real destination of the goods may be very different from that of the vessel in which they are found. The doctrine of "continuous voyage," as it was then called, excited great attention at the time of the American Civil War, and after a very great deal of controversy, I think it may be taken as settled that if it can be shown that the ultimate destination of the goods is the enemy country, they are if contraband liable to seizure as intended for the enemy.

In every case the first question is—are the goods in themselves of the nature of contraband? In the case of all articles which are merely conditional contraband this would involve the enquiry whether they were intended on the one hand for the use of the civilian population, or on the other for the enemy government,

or its armed forces by sea or land. This was a distinction which in the old days was a very real one and the test was easy to apply. Armies were small as compared with the vast hosts with which we have become familiar in these days, in which we see nations in arms. We have not to deal, as the older jurists had, with large civilian populations and small armies of professional soldiers—the whole country of a belligerent is now a camp. Further, in the war which has just come to an end, governments have to a great extent asserted the right of control over all foodstuffs, so that for whatever purpose such a consignment was made, it would, when it reached the enemy country, fall into the hands of the enemy government. The effect which this change of circumstances may have on the application of the old doctrine of law to changed conditions is well illustrated by the Judgment in the case of the *Kim* of the President of the Prize Court, the late Sir Samuel Evans. I cannot mention this name without expressing the sorrow which all felt at his removal by death while yet in the prime of his powers from that Court in which he presided with so much distinction. That was a case in which great quantities of foodstuffs consigned to neutral countries had been seized by British cruisers as contraband on the ground that they were intended for Germany. The Judgment of Sir Samuel Evans, which was afterwards affirmed by the Privy Council, rests to a great extent on the changed conditions of the day as compared with those which obtained when Grotius wrote, and indeed were assumed to exist until the question was re-opened by the circumstances revealed in the recent war.

In fact, I doubt whether in the changed conditions which this war has brought to light the distinction between absolute and conditional contraband still retains the importance which it formerly had in International Law.

The doctrine of "continuous voyage," or, in the better phrase, of the real ultimate destination of the

cargo, is obviously in its nature just as applicable to conditional as to absolute contraband. If goods *ancipitis usus* are really meant for the enemy government or for his forces by land or sea they are as open to the charge of contraband as would be munitions of war themselves. It is not always realized what a peril it was from which this Empire was delivered, when in December, 1911, the House of Lords rejected the Naval Prize Bill. That Bill was one which was intended to give effect to the Declaration of London. It is not too much to say that if that Declaration had been ratified the observance of its provisions would have seriously crippled Great Britain in the war with Germany which broke out only three years later, The advantage of a Second Chamber was never more signally vindicated than by the action of the House of Lords on that occasion. But for that action, we should have entered upon the supreme struggle for liberty and for existence with one arm tied. The 24th Article of the Declaration classed foodstuffs as conditional contraband. The 33rd Article laid down that "conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or for a government department of the enemy." But then came Article 35 and that Article provided that conditional contraband is not liable to capture except when found on board a vessel bound for territory belonging to or occupied by the enemy and when it is not to be discharged at an intervening neutral port, with an exception, however, for the rare case of the enemy's country having *no* seaboard (Art. 36). In other words, the doctrine of "continuous voyage" was practically excluded in the case of foodstuffs. What would have been the effect of this provision if it had been in force when the war broke out? Our navy would have been powerless to treat as contraband the importation of foodstuffs into Germany. Such cargoes were always sent to neutral ports in Sweden, Norway, Denmark or Holland, and from such neutral ports they were to be

conveyed by sea or by land into Germany. Bound by such a treaty we might have been helpless spectators while foodstuffs of all descriptions for the use of the armies of Germany and Austria were poured into these countries. I believe that men of all parties now recognize how colossal was the blunder from which we were so narrowly saved in 1911. Fortunately the Declaration of London was never ratified and it has now been completely discarded.

As things turned out, the outrageous conduct of Germany in organizing and carrying on the submarine campaign placed in our hands another weapon for dealing with her, apart from the law of contraband, by the exercise of the right of retaliation in respect of trade in goods intended for the enemy country. Retaliation in its effect upon neutrals and the "indirect blockade," as it has been called, has been considered in elaborate judgments of the Judicial Committee sitting as the Court of Appeal in prize cases. It will form a most important section in the legal history of this war. I have given a good deal of attention to it and wish that it were possible for me to enter upon it now. But to do so would extend this address beyond all reasonable limits. It would require at least as much time as that which your patience has already accorded to me and the expression of my views must be reserved for some other occasion.

Gentlemen, I have been able within the compass of this address to touch only on the fringe of a vast subject. Our thoughts naturally revert to the experiences of the war from which we have just emerged—the greatest war in the history of the world. And in such a gathering as this there must be many by whom the new chapter in International Law which has yet to be written in consequence of the experience of this war is one that will be awaited with keen interest.

I have touched upon some of these topics on the side of International Law, but I have had vividly present to my mind the sense of what the world has lost

by the death of one who would have approached them from a wider point of view, and whose treatment of these questions would have been interesting alike to the Statesman, to the Sailor, and to the Lawyer. We had all learned to value what Admiral Mahan wrote upon SEA POWER, that great factor in human history, the importance of which has been so signally demonstrated in this war. It is matter for the deepest regret that we cannot have from him a Review of the present war and of the new problems in Naval warfare which it has brought to light. His death has indeed entailed a grievous loss to the literature of the world. Such a review by his hand would have been welcomed alike by his own profession and by ours. I trust that some among you, gentlemen, may be destined to enrich the literature of International Law by a treatise dealing with the great questions, on some of which I have ventured, however inadequately, to touch.

We are entering on a period of Peace, but it will be a very strenuous peace.

> "Yet much remains
> To conquer still—peace hath her victories
> No less renowned than war."

Difficulties and dangers lie before us. In many ways the prospect is dark and the issue uncertain. Of one thing I believe we may all be assured: the Mother Country and the Dominions alike will face the problems of Peace with the same constant courage which has carried them to victory through the long and weary years of war.

II. Retaliation.

I propose to speak to you on some of the lessons of the war as to international law, especially on retaliation and the indirect blockade, as it has been called, which was carried on against Germany by Great Britain latterly in co-operation with the United States of

America. My remarks will naturally fall under three heads:

1. The doctrine of retaliation and its effect on neutrals;

2. The doctrine of continuous voyage; and,

3. The system of rationing neutral countries in the vicinity of Germany.

I. *Retaliation.* The first observation which comes to me is that it has been thought sometimes that neutrals are affected as regards their use of the high seas by the law only of contraband and of blockade in the strict sense of the term. It has, however, always been a part of international law that the position of neutrals might be affected by reprisals exercised by one belligerent against the other, and that neutrals might to some extent be prejudiced by such reprisals. There is nothing new in this doctrine—it is as old at least as the time of Lord Stowell. Lord Stowell had to deal with the Orders-in-Council passed by the British government by way of reprisal for the decrees of Berlin in 1806, 21st November, and of Milan in 1807, 17th August. By these decrees Napoleon affected to put the British Isles into a state of blockade and prohibited all intercourse with them, and all traffic in British merchandise. Having regard to the predominance of the British navy at that time this proclamation of blockade was most audacious, but as the influence of Napoleon was predominant on the continent his decrees were obeyed by his allies and by those who dreaded his power.

Great Britain retaliated for the Berlin decree by the celebrated Orders-in-Council of 7th January, 1807, and 11th November, 1807. By the second of these Orders there was proclaimed virtually a blockade of France and of the countries of her allies, and of all countries which submitted to Napoleon's decrees at Berlin and Milan, a blockade which was partially relaxed by Order-in-Council on 26th April, 1809. A very lucid account of these various decrees and Orders-in-

Council will be found in Manning's Law of Nations, Book III., c. 10, a work which I have found most useful.

In the very recent case of the "Leonora," in which judgment was given by the Judicial Committee of the Privy Council on the 31st July last, reference was made to these Orders-in-Council in the following terms: In delivering judgment, Lord Sumner said:

> "With the terms of the proclamations and Orders-in-Council from 1806 to 1812, their Lordships are not now concerned. They were such that the decisions on them in many cases involved not merely the use of the term 'blockade,' but discussion of or at least allusion to the nature of that right. It is, however, in their opinion a mistake to argue, as has been argued before them, that in those decisions the right to condemn was decreed to arise from the fact that the cases were cases of blockade, although the occasion for the blockade was the passing of a retaliatory order. In their opinion Sir Wiliam Scott's doctrine consistently was that retaliation was a branch of the rights which the law of nations recognizes as belonging to belligerents and that it is as much enforceable by Courts of Prize as is the right of blockade. They find no warrant or authority for holding that it is only enforceable by them when it chances to be exercised under the form or conditions of a valid blockade. When once it is established that the conduct of the enemy gave occasion for the exercise of the right of retaliation, the real question is whether the mode in which it has been exercised is such as to be invalid by reason of the burden which it imposes on neutrals, a question pre-eminently one of fact and of degree."

There has been a great deal of controversy as to these Orders-in-Council. The right of retaliation, even to the prejudice of neutrals, is unquestioned. Sir William Scott asserted it in the case of The Fox

(Edwards 311), and pointed out that retaliation might occasion inconvenience to neutrals, and that if the inconvenience occasioned was greater than was necessary and reasonable, it was not enforceable as against them.

The exercise of the right of retaliation is always subject to review in the Prize Court. This is a real safeguard, as is shown by the decision in the case of the " Zamora " (1916, 2 A.C. 77), which was delivered by Lord Parker, of Waddington. I may pause for a moment to refer to the great loss which our Courts in England have sustained by the untimely death of Lord Parker; his was one of the acutest intellects that has ever been brought to bear upon the study of law, whether municipal or international. It was decided in that case that there is no power in the Crown by Order-in-Council to prescribe or alter the law which Prize Courts administer. The decision on this point followed the principles which were often enunciated by Lord Stowell while it over-ruled a dictum to the contrary which proceeded from that great judge on one occasion. What Lord Parker said was that the Court will give the utmost weight to every such order, short of treating it as a binding declaration of law, and he defined the position of the Courts with reference to Orders-in-Council in the following terms:

> " An order authorizing reprisals will be conclusive as to the facts which are recited as showing that a case for reprisal exists and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency. But this will not preclude the right of any party aggrieved to contend, or the right of the Court to hold, that these means are unlawful as entailing on neutrals a degree of inconvenience unreasonable considering all the circumstances of the case."

If the right of neutrals to carry on trade were absolute, it would make the right of reprisals a mere simu-

lacrum, to borrow a phrase once used in this connection by Lord Sumner. The question always is, is the amount of interference with neutrals unreasonable?

In the present war, Germany entirely threw into the shade the action of Napoleon and the decrees of Berlin and Milan. Napoleon's decrees, outrageous as they were, when compared with the submarine campaign seem innocence itself. The British waters were declared by the German government to be a "military zone." All vessels trading within that area—British and neutral alike—were to be sunk. There was vast loss of life and untold suffering as the result of this submarine campaign. The provocation offered by Napoleon was nothing to that occasioned by these measures of the Kaiser. Any retaliation in kind by Great Britain was impossible, for two reasons: in the first place, there were no German ships at sea, and in the second place no English government could ever stoop to the commission of such outrages as disgraced the flag of Germany. The only possible reprisals were by cutting off the trade of Germany. That trade was carried on entirely through neutrals, as German merchant ships did not venture to cross the seas. Under these circumstances His Majesty's government passed the order-in-council of March 11, 1915, which was a retaliatory order. It is mild and humane in its provisions, and presents a striking contrast to the German methods.

By this order all vessels sailing after the 1st of March, 1915, for or from any German port, were not allowed to proceed on their voyage—provision was made for their discharge in British or allied ports, and for the cargo being put into the custody of the Marshall of the Prize Court, and the goods or proceeds of the sale were ultimately to be dealt with as appeared just. This order further provided that goods which were enemy property, or of an enemy origin or destination found on any vessel sailing after the 1st March, 1915, from or for any non-German port, should be similarly dealt with.

The validity of this order was attacked in the case of the Stigstad (1916, P. 123 and 1919 A.C. 279) but it was upheld as against the neutral by Sir Samuel Evans, whose untimely death we all deplore, and who has left behind him an undying memory as a great judge in prize cases.

The Stigstad was a neutral ship bound for Rotterdam from Norway. She carried goods intended for Germany and was compelled to discharge them at Middlesborough by an English man-of-war. It was held by the Privy Council affirming in precedent that the neutral shipowner was not entitled to any damages as there had been no unreasonable amount of inconvenience occasioned to him, and the principles laid down in Lord Parker's judgment in the "Zamora" were followed and applied.

In the judgment of the privy council, at page 287, after reference to the German outrages at sea, it is said:

> "Neutrals whose principles or whose policy led them to refrain from repressive action on their own, may well be called upon to bear a passive part in the necessary suppression of courses which are fatal to the freedom of all who use the seas. The argument principally urged at the Bar ignored this consideration and assumed the absolute right of neutral trade to proceed without interference or restriction unless by the application of the rules heretofore established as to contraband traffic, un-neutral service and blockade. . . . For this contention no authority at all was forthcoming. . . . To deny to the belligerent under the head of retaliation any right to interfere with the trade of neutrals beyond that which, quite apart from circumstances which warrant retaliation, he enjoys already under the head of contraband, blockade and un-neutral service, would be to take away with one hand what had been formally conceded with the other."

To put it shortly, the principle is that neutrals must submit to such inconvenience so long as it is not more than is necessarily incident to the exercise of retaliation.

The German submarine outrages continued and multiplied, and an order was made by the German government on the 1st February, 1917, prohibiting all traffic in certain zones over widespread areas of the high seas affecting to regulate even trans-Atlantic traffic, prescribing zones and routes and enacting that vessels were to be painted in a special fashion like barbers' poles, as was said in the United States, and warning neutrals that if vessels entered the forbidden zones they would be there at their own risk. On the 16th February, 1917, His Majesty issued a second order-in-council, also by way of retaliation. It will be found in the London Gazette of 20th February, 1917. The effect of this order was:

"(1) To give effect to a very reasonable presumption by prescribing that any vessel going to or from any neutral port affording access to enemy territory without calling at a British or allied port, was, till the contrary was shown, to be deemed of enemy origin, and was to be brought in for examination and, if necescary, for adjudication.

"(2) Any vessel carrying goods with enemy destination or of enemy origin was declared to be liable to capture and condemnation unless she called at a British or allied port for examination.

"(3) Goods of enemy origin or destination were declared to be liable to condemnation."

Every care was taken to minimize the inconvenience of calling at British ports. Halifax was allowed as more convenient than Kirkwall and Falmouth.

The validity of this order was called in question in the case of the "Leonora," that very recent decision

of the privy council to which I have already referred. In that case the vessel was carrying coal from Belgium (while in German occupation) for Sweden, and she had not called for examination at any British port. The ship and cargo were condemned and the validity of the order-in-council of 16th February, 1917, was upheld.

The " Leonora " is a leading case in international law, and I may be permitted to refer particularly to the scope and effect of the judgment of the privy council.

My references are to the printed judgment, delivered by Lord Sumner at the privy council; it has not yet been published in the law reports.

On page 3, he states what was the ground of attack on the order-in-council.

> " The appellant's main case," he says, " was that the order-in-council was invalid principally on the ground that it pressed so hardly on neutral merchants and interfered so much with their rights that as against them, it could not be held to fall within such right of reprisal as a belligerent enjoys under the law of nations."

On page 4, he goes on to point out that:

> " There are certain rights which a belligerent enjoys by the law of nations in virtue of belligerency which may be enforced by us against neutral subjects to the prejudice of their perfect freedom of action, and this because without these rights maritime war would be frustrated and the appeal to the arbitrament of arms made of none effect."

Again on page 4 he lays down what the sanction is:

> " Disregard of a valid measure of retaliation is against neutrals just as justiciable in a Court of Prize as breach of blockade or the carriage of contraband of war. The jurisdiction of a Court of Prize is at least as essential in the neutral's interest as in the interests of the belligerent, and if

the Court is to have power to release in the interest of the one, it must also have inherent power to condemn in justice to the other."

The appellants had argued that the order-in-council purported to create an offence in failure to call at a British or allied port, which is unknown to the law of nations, and on page 5 occurs a passage dealing with this point which from its importance I cite textually:

> "In the terms of the present order, which says that a vessel shall be 'liable to capture and condemnation' and that 'goods should be liable to condemnation,' some argument has been found for the appellant's main proposition that the order-in-council creates an offence and attaches this penalty, but their lordships do not accept this view. The order declares by way of warning and for the sake of completeness the consequences which may follow from disregard of it, but if the occasion has given rise to the right to retaliate, if the belligerent has validly availed himself of the occasion, and if the vessel has been encountered at sea under the circumstances mentioned, the right and duty to bring the ship and cargo before a Court of Prize, as for a justiciable offence against the right of the belligerent, has arisen thereupon, and the jurisdiction to condemn is that which is inherent in the Court."

Again on page 8 is found a statement of the principle:

> "The right of retaliation is a right of the belligerent, not a concession by the neutral. It is enjoyed by law and not on sufferance and doubly so when, as in the present case, the outrageous conduct of the enemy might have been treated as acts of war by all mankind."

It must not be forgotten that while war brings upon neutrals a certain amount of hardship it may also give

them the opportunity of making very considerable profits. I think that Sir Samuel Evans on one occasion remarked that neutrals said more about the former than about the latter.

II. *Continuous Voyage.*. The application of reprisals directed against the trade of Germany was complicated by the fact that during the war Germany did not import directly to her own harbors, but drew her supplies through surrounding neutral countries—Holland, Sweden, Norway and Denmark. The problem was solved largely by the application of the doctrine of continuous voyage, in the establishment of which the Prize Courts of the United States have played so conspicuous a part.

The doctrine of continuous voyage had humble beginnings. In 1756, and later in the course of the great war between England and France, it was applied in dealing with neutrals who took part in trading with the enemy's colonies, which, in times of peace, had been open only to French subjects. During the war French colonial trade was thrown open to the Dutch and to other neutrals, and the same thing occurred with the Spanish colonial trade. The English treated those neutral vessels which availed themselves of the enemy's permission so to trade, as siding with the enemy, and the neutral vessels were captured and forfeited. To avoid the danger of this it became a habit with the neutral merchants to make a colourable importation into a port from which the venture would be permissible. To take a concrete case: A cargo from La Guavra for Bilboa was landed at Marblehead, Mass., and re-embarked for Bilboa. The case came before Lord Stowell, who asserted the doctrine of continuous voyage in these words:

> " It is an inherent and settled principle in cases in which the same question has come under discussion that the mere touching at any port without importing a cargo into the common stock of the country, will not alter the nature of the voyage,

which continues the same in all respects, and must be considered as a voyage to the country to which the vessel is actually going for the purpose of delivering the cargo at the ultimate port." (The "Maria," 1805, 5 C, Rob. 368.)

In the case of the "Maria" the device was transparent, but the same principles will apply in the case of trans-shipment into another vessel. In the American Civil War the doctrine of "continuous voyage" leaped into fame. You are all aware that Nassau in the Bahamas became a great emporium. Ships came across the Atlantic Ocean bound for Nassau with cargoes which were there to be transhipped and taken to confederated ports. In the case of the "Bermuda" (1865, 3 Wallace 551), the vessel was seized on a voyage from England to Nassau, and the Supreme Court of the United States decided that as the real ultimate destination of the goods was hostile, the interposition of another port between the neutral port of departure and the belligerent destination was of no avail. "A transportation from one port to another remains continuous so long as intent remains unchanged, no matter whether stoppages or transhipments intervene."

In the case of the "Springbok" (1866, 5 Wallace 1), the vessel was in like manner seized before arriving at Nassau and the cargo was condemned on the same ground as in the "Bermuda." The case is of some importance, because Lord Russell, the English Foreign Secretary, refused to intervene on behalf of the cargo owners on the ground that the real destination of the cargo was not Nassau, but for a belligerent port. These decisions gave rise to a great outcry and were denounced as involving "a violent extension" of the doctrine of continuous voyage. But it is now quite apparent that these decisions of the Supreme Court were based on common sense, and I think I may say that they are, at the present date, universally recognized as forming part of international law.

The question arose again in 1900, during the war between England and the Boers. The Transvaal had no port, and consignments were made to the Portuguese port of Lorenzo Marquez, whence cargoes were to be taken to the Transvaal by rail. As Law Officer I had a great deal to do with the discussions which then arose. Great Britain claimed the right to seize such goods on their way to Lorenzo Marquez, and Lord Salisbury invoked the doctrine of continuous voyage. One precedent on which Great Britain relied was set in 1896 by the Italian courts, who applied the doctrine in the case of the "Doelwyck," a Dutch ship with a cargo of arms consigned to the French port of Djibutil in the Red Sea, but really intended for transmission to Menelik, King of Abyssinia, then at war with Italy, and, to conclude this historical sketch, I think I may say that the doctrine of continuous voyage has been finally established by the action of the Allied Powers in the course of the present war.

In an otherwise admirable work, Hall's "International Law," there occurs a strong attack on these decisions of the Supreme Court of the United States. This work has run through many editions. The passage still stands in the text, but it is in strong contrast with the notes which in the later editions trace the subsequent history of the doctrine and show the triumph of the American view of continuous voyage. I should like to suggest for consideration whether, in the next edition of "Hall's International Law" this passage should not be recalled. The work is a most valuable one. Every student of international law is proud to acknowledge his obligations to it, and I cannot help thinking that the amendment which I suggest would be the removal of a blot.

It follows from the doctrine of continuous voyage that goods consigned to ports in neutral countries in the neighborhood of Germany, and intended for transmission to Germany, might for the purpose of reprisals be treated as consigned to Germany just as much as if

they had been bound direct for a German port. The doctrine of continuous voyage was, of course, also applicable in the case of contraband intended for Germany, and its scope in this respect was greatly increased by the disappearance of the importance of the distinction between conditional and absolute contraband. Take the case of foodstuffs. The question whether they were contraband might depend on whether they were intended for the use of the civil population in the enemy country, or for the enemy forces. This test was easy to apply in the days of Grotius, and for a long time afterwards, when one had to deal with relatively small standing armies, and, having regard to the want of facilities for transport in those days as compared with the present, it was comparatively easy to ascertain whether the foodstuffs were intended for the use of the civil population, or for the use of the armed forces of the country. The distinction is not so easy to draw now that we have the spectacle of whole nations in arms.

There is another fact which made it difficult to maintain the doctrine of conditional as against absolute contraband. Goods of the nature of conditional contraband become contraband if consigned to the enemy Government. The German Government, like other Governments, in the course of the war, assumed control of imports. They were perfectly within their rights in doing so, and other countries did the same. But it is obvious that as soon as the Government assumes such control of imports, the distinction between consignments to private citizens of the enemy country and consignments to the Government of that country, for practical purposes, disappears. The goods which, apart from such Government's control, would have been conditional contraband, become absolute contraband.

III. *Rationing.* Germany had attempted to starve England into submission by the submarine compaign and the object which England had in view was to establish an indirect blockade of Germany. In other words, England proposed while avoiding, as far as possible,

any interference with imports into neutral countries near Germany, so far as they were wanted for the supply of their own needs, to prevent these countries from being used as conduits for the supply of Germany. This object was achieved by the adoption of a system of rationing these neutral countries according to their normal supply in pre-war days. The restrictions of imports through neutral countries was effected by means of the prevention of trade in exercise of the right of retaliation and by the enforcement of the law of contraband. If, during the war, a neutral neighbor of Germany imported three or four times as much as she had imported before the war, the inference was obvious that the surplus would go to Germany. This excessive import to neutral countries was stopped by agreements entered into with bodies representing the traders of the neutral country. These neutral countries were rationed according to their pre-war standard, and the goods were imported on the terms that they should be used for the neutral's own wants and that they should not go to Germany.

This system of " rationing " was most effective. It was, in the great majority of cases, carried out by agreement, so that no difficulty could arise with regard to the question whether the destination of any particular consignment was hostile, as it might have arisen if the rationing had been carried out under compulsion. Such difficulties might not have been insuperable, but rationing by agreement was far more effective and worked more smoothly than rationing by compulsion could have done.

Trade was facilitated by the grant of licenses and letters of assurance which were granted to British merchants, and to merchants of allies or neutrals, who might be trusted to use such permission honestly for the supply of neutral countries, and not for import into Germany under cover of supplying the wants of neutrals. A " Black List " was kept of those traders who there was reason to believe were acting in the interests of the enemy. The issue of such permits minimized the

interference with legitimate trade as the possession of such permits secured the vessel against being stopped and taken into port by any British or allied cruiser.

The associations in neutral countries with whom we entered into such agreements for rationing, guaranteed that no part of the supplies should pass into the hands of traders on the " Black List " or of those who might reasonably be suspected of acting in the interests of Germany. They had every reason for observing their agreement in this respect, for any breach by permitting a leakage to Germany would have led to a corresponding diminution in the amounts available for their own countries and the guarantees were in fact observed.

The " indirect blockade " was further supported by the refusal of bunkering and repairing facilities to neutrals reasonably suspected of active sympathy with the enemy in the matter of supplies. The financial position of London enabled the Allies by the refusal of banking facilities to curtail the operations of any traders who were disposed to help the enemy in this matter.

In all those measures Great Britain had, during the last year of the war, the inestimable advantage of the hearty concurrence of the United States of America.

The prime and decisive factor in the success of the pressure which the Allies were able to bring to bear upon German trade was, of course, the predominance of British naval power. But it is mere justice to say that the successful conduct of the " indirect blockade " was very largely due to Lord Robert Cecil, who, during a long and critical period, was Minister of Blockade. He is, in my opinion, entitled to a great part of the credit for the triumph of civilization over barbarism in this great struggle, and he can with truth say that the weapons with which he fought were—unlike those of our opponents—not those of barbarism.

May I be permitted to observe in conclusion that one most conspicuous element in the defeat of the submarine campaign—the most notorious in the history of

the world—has been the constant and unflinching courage of the sailors of the mercantile marine, of the British Empire, of the United States, and of the neutral as well as the Allied nations. If Germany hoped that by her brutal methods she might create a panic among sailors and prevent ships putting to sea, she must now realize how gross was the delusion in reliance on which she entered on her career of crime. It has ended as it deserved to end, in failure and in shame, and those who would have gloried in its success are fain to find apologies for their complicity.

TEMPERANCE LEGISLATION.

We are in receipt of a letter from that well-known publicist, Mr. Ernest Heaton, who writes informingly on the treatment of the liquor question in Sweden under what is known as the Bratt System. We have no hesitation in printing his letter in this issue, which will reach our readers after the 20th October, and would in any case influence results quite as much as a moderate argument would have influenced the feeling on slavery or abolition immediately prior to the American Civil War.

The matter of prohibition has ceased in this province to be a discussion. It has become a tenet of religion. Nor is this belief of recent growth. It started in the beginning of last century with the Itinerant Ministers.

In those early days of Upper Canada, rum was not a personification, but a specific and plentiful commodity. Whiskey was not only sold without hesitancy in gallons and barrels by every tavern and grocery, but was used as part wages for the hired man, a custom which lingered until in Edward Blake's day they made it illegal to pay wages in truck.

Travellers visiting the smaller places found their comfort upstairs in the hotel and got such repose as they might while listening to the unsubdued revelry below which took the form of dancing of a sort, singing also of a sort and fighting of a sort that would make the cruel Hun think he was a Sunday school boy.

When the Itinerant Minister arrived he found the only indoor meeting place, to wit, the tavern, fully occupied and devoted, in his phraseology, to "Fiddling, Dancing and Serving the Devil." Thus the fight against liquor was not optional with the preacher.

Result: that by 1824, when Egerton Ryerson was entering on his career the hatred of liquor was as much a tenet of religion with at least one denomination as anything in the Sermon on the Mount. Other denomi-

nations were gradually swept into the same way of believing. Generation after generation of temperance orators arose using the same illustrations and the same phrases as the original sturdy combatants. Which accounts for the use of the words " the Demon Rum " in a province where for thirty years before the war a tippler calling for such an obsolete drink as rum became an object of curiosity and was suspected of wanting to divert the means of sociability to some selfish purpose, such as the cure of a cold. But " Demon Rum " are not words of description, but of faith.

Now the average lawyer does not break his teeth in unremunerative discussions; and no discussion is so bitter and profitless as one which involves the facts in unalterable articles of belief. Accordingly, what appeals to the philosophic as well as the practical student of legislation is the mechanics of enforcement.

Anyone with even a little historical knowledge knows the story of smuggling in England; how the Government kept increasing the penalties until they were barbaric in their ferocity, until there was no close season for killing a gauger, until even the magistrates were in collusion with the smugglers and until the smugglers' organization was so perfect that they laughed at both Nelson and Napoleon. Also the staple article of the smuggler of those days was brandy.

The elements of friction that later clog, to the point of breakdown, enforcement of a prohibitory law do not appear for some months. This is especially the case where as in this province the well-to-do were allowed to import into their own cellars—in anticipation of a siege—a six million dollars' reserve of liquor. Until that reserve was exhausted the neutrality of the prosperous citizen was secured.

Accordingly, the first fruits of the O. T. A. were lovely. Crime caused by drink disappeared, retailers were no longer troubled with bad debts, homes that had been squalid became bright and happy. If not exactly the Golden Age it was a period of honeymoon when people saw that the present was good.

But the framers of the Act had forgotten some things. Among other things, like the Hun (in the early years of the war) they underrated the tactical ingenuity of the Canadian. The Act is in the nature of all acts that force anything on a large unwilling part of the community, a necessarily violent Act. The penalties against the bootlegger are intentionally severe. The punishment of the villain caught carrying a flask is ferocious.

Stunned for a while by the terrific barrage of the O. T. A. the ingenuity of the Canadian betook itself to tunnelling operations. To-day the customer knows where and the bootlegger knows how. Prosecutions for B. O. T. A. seem the main thing on the Police Court calendar, and it is very doubtful if they represent the seizure and stoppage of ten per cent. of the goods.

Another weakness of the O. T. A. is that it does not adequately foresee and provide against the profitableness of collusion. The goods have become enormously valuable (for external use by sale to others). The margin of profit makes the profiteer in other lines seem benevolent. It is, therefore, to the interest of the profiteer in this line to pay a substantial share of his gains to secure immunity. On the other hand it is difficult to make the rewards high enough to keep preventive men steady in what is an always disagreeable and terribly unpopular and increasingly dangerous line of duty.

By this time the bootlegger and his pursuer know each other fairly well by sight. The danger of their "getting together" is no longer hypothetical.

One of the weaknesses of the situation is that the same people whose enthusiasm drives through the legislation are not invited to administer the details of enforcement. These usually fall, especially in the lower grades of appointment, into the control of coarse persons of a cynical disposition. There seems no reason why the women and clergymen who have continuously denounced the evils of the liquor traffic should not have a first call to duty on all appointments necessary for the suppression of those evils. There is

not any doubt, either, that under the old license system if for every male license inspector there had also been a woman appointed with equal and co-ordinate powers the general public complaint of untidiness and squalor in many so-called hotels would soon have disappeared. One of the characteristics of our Ontario style of hotel up to date is a lack of daintiness or home charm. The whole system seems to have been "keeping bach."

THE SWEDISH SYSTEM.

The Editor,
"Canadian Law Times,"
Toronto, Canada.

DEAR SIR,—Every Ontario elector should read the clear, detailed account of the experience of Sweden in dealing with the liquor problem which appears in the September number of the *American Scandinavian Review,* published at 25 West 45th Street, New York.

The Swedes had total prohibition during the war, following a system of Government control. It proved a failure; intemperance increased; illicit stills could not be controlled. They have now adopted what is called the Bratt System of Individual Control. This has been so satisfactory that it is about to be adopted by Norway. The sale of liquor is confined to a few companies controlled by the local authorities. These companies must pay all profits over five per cent. to the Government. Every person who wants to purchase liquor must first obtain a license to buy from the nearest vendor. The license limits the amount which may be purchased. It may be refused for good reasons, and may be cancelled if the license is abused. Every license bears the signature of the purchaser, and has coupons attached which are held as vouchers for liquor sold. A card system is kept by the vendor, with the record and duplicate signature of every licensee.

A committee of sensible men could easily formulate a scheme along these lines which will fit this Province. The underlying principle is control of the consumer. I have given the outstanding points of this system. There are other regulations which make the control complete. The young man and the weak man can be absolutely protected, and pure Government liquor will be purchased at a reasonable price by the certificate of the Government in time for an emergency, instead of bad liquor, too late, by a doctor's certificate.

Every man of common sense will resist with all his might the attempt to make the referendum a dog fight between prohibition and the bar. There are a few zealots, whose slogan is "Prohibition or Bust, and Damn the Consequences." The rest of us want to vote for what is best for the country. We know that no Government can cope with the illicit stills; liquor is too easily made. We know that hundreds of our best citizens who never broke the law before are breaking it now with a clear conscience. We know that people are poisoning themselves with drugs, and we know that as sure as day follows night there is bound to be a reaction if total prohibition is suddenly forced upon the province as a settled policy. The only reason that any of us are considering prohibition at all is that we will not have the old bar system back at any price, and up to now no alternative plan has been placed before us. Here is the alternative—control of the consumer in place of control of the vendor only. It is a sane solution of the problem at any rate in dealing with spirituous liquors.

The practical question now is—how shall we vote on this referendum? Obviously, we must first clear the decks of existing legislation by voting "Yes" to the first question—"Are you in favour of a repeal of the Ontario Temperance Act." Some people would make us believe that this vote will restore the open bar as it previously existed in Ontario. This is a false cry plainly invented to drive people to vote for the present Act against their convictions. It would stultify the

whole referendum. The old license law was repealed by the Ontario Temperance Act; there are no outstanding licenses, and no stretch of the imagination can make an affirmative vote on this question serve as a mandate to permit the sale of any liquor over the bar.

Yours truly,

ERNEST HEATON,
Editor of Heaton's Annual.

Toronto, 22nd September, 1919.

HOW THEY CREMATE DEAD CHARTERS IN MANITOBA.

The *Manitoba Gazette* contains a ten-page list of names of Companies with this significant heading:

CHARTERS REVOKED AND CANCELLED.

"Public notice is hereby given that, by Order-in-Council, dated the nineteenth day of August A.D. 1919, the undermentioned Companies having failed to file an annual return with the Provincial Secretary, for three successive years, in accordance with the provisions of Section 86 of 'The Companies Act,' their charters have been definitely revoked and cancelled, and their names removed from the Register of the Provincial Secretary."

NEW BOOKS.

A MINE FOR CONSTITUTIONAL LAWYERS.

Judicial Settlement of Controversies between States of the American Union, cases decided in the Supreme Court of the United States, by James Brown Scott, A.M., etc., 2 volumes, $7.50, Oxford University Press: Carswell Company, Ltd.

Hitherto, complains the learned editor and compiler, "like all others interested in these matters, he has been forced to consult the many volumes of the Reports through which these decisions run like threads of gold." The formidable fatigue involved in looking up these threads of gold has rather discouraged British lawyers and constitutional students from taking free advantage of American experience, analogies and precedents in unravelling our own similar snarls. We have rather taken refuge in certain outstanding differences between American and British States as being sufficient to enable us to disqualify American experience as inapplicable to our own conditions. This was probably pure laziness, the excuse for which has been removed by these solid volumes.

What is more, in the future of the League of Nations (or whatever may succeed that) it is clearly the American intention to insist on the practice and procedure of the U. S. Supreme Court taking the centre of the road when it comes to settling precedents. This is a favourite notion of Mr. Scott's. He says:

"In a little over a century, beginning with 1799, and ending with June 10th, 1918, when the latest was considered in the Supreme Court, some eighty odd controversies between the States have been argued, debated and decided by that tribunal. As the result of argument, debate and decision, practice has been settled and procedure adopted in the light of experience as applicable to States of the Society of Nations as to States of the American Union."

Whether one wishes to support or oppose this world-sweeping American pretension these volumes are equally indispensable.

WAR CRIPPLES.

Disabled Soldiers and Sailors, Pensions and Training, by Edward T. Devine, Professor of Social Economy, Columbia University, Oxford University Press (Carnegie Endowment), Carswell Company, Ltd., $1.00

While so many theories are current and several schemes are operating (most of them missing on several cylinders) and several proposals are before the Canadian Parliament as to the civil re-establishment of the returned soldier, this careful little work is very timely. It deals with the historical and collects the various attempts to be grateful to the soldier from the days of Athens to the Civil War. It analyses current developments in Great Britain, Canada, France, Germany and Austria and the United States, and it outlines the new programme, including Physical Restoration, Financial Indemnities and Economic Re-establishment.

The record is not entirely flattering to the progress of civilization in the United States.

"All efforts to help the disabled have been hampered in the past by lack of facilities for training the handicapped and by indifference on the part of the general public. In fact, in our provision for civil cripples (except for compensation, which affects only those disabled in industry, and those only in their financial problems), we have hardly progressed beyond the first stage in the evolution of care for war cripples. Our main reliance in the twentieth century is that of the middle ages—license to beg from the public, with or without the transparent disguise of a few shoestrings or pencils offered for sale. Our subway stations and shops and traveled streets have their counterparts of the mutilated figures which frequented the

highways and market towns and fetes of medieval Europe, the only difference being that these recite no thrilling tales of adventure and conflict, but limit themselves to a whining formula or find it sufficient merely to supply a cup or a cap to receive the ready coins of the sensitive public."

Of the Canadian attempts to grapple with the problem of disability the author says:

"In planning for disabled soldiers Canada had even less to build upon than the mother country, but she attacked the problem with youthful western vigour, and has worked out a system which seems to be adapted to her needs. Although the Canadian Expeditionary Force was not in the field as early as the English army, and although the early stages of treatment of Canadian wounded must of necessity take place across the ocean, so that their presence was not felt at home as an inspiration and goad to action, Canada anticipated England in several steps of progress, and has the distinction of being the first country (except Belgium) to organize the vocational training of disabled soldiers on a national basis, under a central authority."

Seemingly Germany was just as far-seeing in its intended disposition of war cripples as in providing the machinery and occasion for making them.

"The Central Powers were better prepared at the start to care for their disabled men than were the Allies, just as they were better prepared to wage war. Both Germany and Austria already had in operation pension systems which, especially that of Germany, have been only slightly modified to meet the demands of the present situation. In Germany, furthermore, there had been a marked development of institutions for the care and education of crippled children during the preceding decade, and there existed a national organization for the care of cripples, which was ready to formulate a comprehensive programme and principles of action, as well as to serve as an agency through which available resources could be promptly utilized."

HOW THEY WORKED IT IN ENGLAND.

British War Administration, by John A. Fairlie, Professor of Political Science, University of Illinois, Oxford University Press (Carnegie Endowment), Carswell Company, Ltd., $1.00.

We all know who Mr. Lloyd George and Mr. Asquith and Lord Kitchener and several others are or were. But when we begin to interest ourselves in the comings in and goings out of some lesser potentates the scheme of organization of affairs becomes curiously irregular and intersected like a trench map of some ground that the Germans did not want us to cross. Professor Fairlie has made a fair guide book to the various administrative agencies that arose and flourished during the War. Such chapters as "Munitions and Aircraft," "Defence of the Realm," "Agriculture and Food Control" reveal devices in administration unknown to peace times.

What for future generations will prove the most entertaining reading in his book are bare lists, *e.g.*, a list of food orders occupying seven pages and a "list of official commissions and committees set up in the United Kingdom to deal with public questions arising out of the War," comprising 409 precious and patriotic bodies dealing with everything from Abrasives to Zinc and Copper Research.

The name of every one of these committees is a text for a sermon in economics or applied science or for a study in the war-perturbed relations of the country or is a clue to some romance connected with the far flung trade of Britain.

LOCAL AND PERSONAL.

Hon. J. L. Decarie, new Chief Justice of the Sessions Court and formerly Provincial Secretary, was sworn in with much ceremony at Montreal by Chief Justice Lamothe in the presence of Judges Choquet, Bazin, Cusson and Marin.

The Hon. J. H. Bell, K.C., has been sworn in as Premier of Prince Edward Island. He has long been a popular figure in the public life of the Island.

Capt. Evan Hamilton McLean, late of the 235th Batt. C. E. F., who formerly practised in Bowmanville and lately was Junior Judge of Renfrew, has been appointed County Judge of Prince Edward County, Ontario.

Miss Muriel Lee, B.A., daughter of Mr. Lyman Lee, and the third woman lawyer to take up practice in Hamilton, has entered her father's firm, Lee and Simpson.

The Law School at Osgoode Hall was never so crowded, the total registration being 446 of which number it is estimated not less than two-thirds are returned soldiers.

Four judicial promotions have been made in Ontario: Judge J. Coughlin, Junior Judge of Kent County, is appointed Judge of Essex; Judge R. D. Gunn, Junior Judge of Carleton, is appointed Judge of the same county; Judge Hearn, Junior Judge of Waterloo, is appointed Judge of the same county, and Judge Widdifield, Junior Judge of Grey County, is appointed Junior Judge of York.

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ADMINISTRATION OF CRIMINAL LAW.

October 10th, 1919.

The Editor,
"The Canadian Law Times,"
Toronto, Ont.

Dear Sir,—Mr. Popple's timely article in your issue for September is indicative of the growing feeling of dissatisfaction with the administration of the Criminal law. Serious as are the matters referred to by Mr. Popple, any lawyer who has much criminal work to do can cite you instances of oppression in the administration of the criminal law within his own experience of an even more serious nature than those referred to by Mr. Popple in his article, acts of oppression which one can scarcely believe could happen in a civilized country. Neither do such acts of oppression occur only in the courts of the Justices of the Peace and Police Magistrates. From among the many cases, which I call cases of oppression in the administration of the criminal law, which I have come across in my short experience, let me refer to but one, the circumstances of which by reason of its having occurred very recently are quite fresh in my memory.

A young man, Joe Nicklom by name, was convicted by His Honour Judge Morrison of the Stettler Judicial District, upon a charge of cattle stealing. The conviction was warranted by the evidence before His Honour. Indeed upon the evidence before the trial judge there was no room for that reasonable doubt which is essen-

tial to an acquittal. Subsequently to the trial and conviction, however, new evidence came to light, which at the time of the trial was unknown to the defence, and which, had it been put before the Court at the trial, would undoubtedly have put a wholly different complexion upon the affair in question, and in all probability would at least have created a reasonable doubt in the judge's mind as to the accused's guilt.

Application was made to the Minister of Justice for a new trial under the provisions of Section 1022 of the Criminal Code. On behalf of the accused I first interviewed the Solicitor-General in person, who coolly informed me that Section 1022 of the Code was a "dead letter" in the law, and that the Minister of Justice had decided not to entertain any more applications for new trials under that section. From the Solicitor-General I went to Mr. Meighen, then acting Minister of Justice, who gave me every encouragement, but referred me back to the Solicitor-General with directions to place a written application in the form of a letter with the Solicitor-General asking for a new trial.

I herewith quote my letter of application for a new trial, together with a memo. of the decision of the Minister of Justice (see memo. attached), and my letter to the Minister asking for reconsideration. (Copy of letter attached).

Ottawa, April 4th, 1919.

The Honourable, the Minister of Justice,
Ottawa, Ontario.

Rex versus Joe Nicklom.

DEAR SIR,—On behalf of the above mentioned Joe Nicklom, a convicted person, I herewith make application for executive clemency under the provisions of Section 1022 of the Criminal Code of Canada, and I beg herewith to file the material in support of my said application, which said material consists of the transcript of the evidence taken upon the trial of the accused, the affidavit of one Mike Kerbes, the affidavit

of one Edward Klaus, the affidavit of one August Nicklom, letter of His Honour Judge Morrison, dated March 10th, 1919, and addressed to The Honourable the Minister of Justice, the exhibits produced on the trial, and an explanatory letter of John Nicklom, brother of the accused, dated March 21st, 1919, which said explanatory letter was received by me the day that I left Red Deer to come to Ottawa to present this application, and in consequence of my not having received said letter at an earlier date it was impossible for me to correct the affidavits now used in respect of the matters mentioned in the said letter. I would respectfully call your attention to the fact that the application is necessarily made in the form of an application for executive clemency in order to comply with Section 1022 of the Criminal Code, but that it is in reality an application for a new trial, made for the purpose of vindicating the character of the accused. Executive clemency implies guilt, and the grant thereof as such would not effect the accused's real purpose in making the application, his hope being that the Minister may exercise his discretion, under the striking circumstances, to order a new trial. The sentence which the accused is undergoing is for the period of only six months, and the accused has already been under sentence since the fourteenth day of January, 1919. He is a very young man (twenty-one years old). The sentence will soon have been served, but the stigma of its service will last for his life-time.

A perusal of the decision of His Honour Judge Morrison will show that the accused was convicted upon the evidence of one witness, John Henry Lockwood, as to the identity of the accused. This statement is confirmed by the judge's letter. A perusal of the affidavits filed will show that it was discovered some time after the trial and conviction of the accused that the witness John Henry Lockwood had (before the trial) had a conversation with Mike Kerbes, whose affidavit is filed herewith, in which conversation the said John Henry Lockwood stated that he had been

unable to identify the person who committed the offence at the time that it was committed because he had seen the guilty person from a distance of sixty yards, the back of that person being turned towards him, and that the said John Henry Lockwood also stated in said conversation that he thought that the party who committed the offence was either the said Joe Nicklom, convicted in this case, or one George Veach, whose name appears in the affidavits as George Swiatch, which mistake is explained as above mentioned in the letter of John Nicklom hereinbefore referred to.

The accused was examined on the trial and denied his guilt.

The witness John Henry Lockwood was not questioned at the trial as to any conversation with Mike Kerbes because, at the time of the trial, the fact of the conversation was unknown to the defence.

I would respectfully request that consideration be given to the application of the accused, and that if, in your view, the material filed warrants it, the accused be given a new trial upon the charge of which he was convicted as disclosed by the material filed.

Yours respectfully,
(Sgd.) A. H. RUSSELL.

Memo. of Decision of Minister.

I apprehend that Section 1022 of the Criminal Code confers a power upon the Minister of Justice to order a new trial which may, perhaps, properly be exercised in a conceivable case, but I do not think that the conditions for the application of that section are satisfied merely by the production of a material witness discovered after the trial.

While the Courts have always exercised a jurisdiction which is well established to grant new trials in civil cases upon the ground of the discovery after trial of material evidence, that jurisdiction is exercisable

only within strict limitations, and it has never been extended, either by common law or statute, to criminal proceedings. The Minister of Justice has no means of convening or hearing the parties, neither is any of the ordinary procedure prescribed for judicial proceedings available to the Minister for the purpose of conducting an enquiry, and it seems inconceivable that the Minister should, in these circumstances, be the repository of a power which is denied to the Courts and which can only be beneficially exercised under the safeguards which are incident to the ordinary judicial proceedings.

Moreover, the facts of the present case do not satisfy the requirements of an application for new trial for subsequently discovered evidence even in a civil case, and the granting of a new trial upon the affidavits produced would operate as an invitation or precedent which would probably produce similar applications so numerous that it would be necessary to provide a special organization for disposing of them.

It must be considered also that while a new trial may be ordered by the Minister of Justice the trial must be conducted at provincial expense, and a situation in which the Minister of Justice would administer the power upon the generous principles which this application invokes would be well qualified to engender an undesirable conflict between the Dominion and the Provincial authorities.

RED DEER, *Alta.*,
May 12th, 1919.

The Honourable Arthur Meighen,
Acting Minister of Justice,
House of Commons,
Ottawa, Ont.

Rex vs. Joe Nicklom.

DEAR MR. MEIGHEN,—Upon my arrival home from the East I found your letter of April 22nd, together

with copy of the opinion in which you state you concur, and I note you do not see your way clear to order a new trial. Before making known this opinion to my client or in any way discussing the same publicly or commenting upon it in some one of the various legal publications to which I subscribe, I wish to call the matter once more to your attention in the hope that you might reconsider it. I cannot conceive of your having read and carefully considered the opinion in which you state in your letter you concur. To so believe I would first have to be assured that the reputation for ability as a lawyer which you possess, is, as Mark Twain once said about the report concerning his death, "greatly exaggerated." I cannot believe that the reputation you possess is not justified, I prefer rather to believe that you never seriously considered this case. I might add that I discussed this case very thoroughly with one of the highest legal authorities in Canada, whose name I need not mention, but who is well known to you, and he remarked to me that I was extremely fortunate in having the matter come before you as you would undoubtedly go thoroughly into the matter and that you could not fail to be convinced of the prisoner's right to a new trial.

The opinion in which you state you concur appears to me to be most superficial, and I can only understand its having been propounded from the recollection of a conversation which I had with the Solicitor-General when I first took this matter up with him. On that occasion I asked the Solicitor-General who it was that dealt with applications of this kind—whether it was the Solicitor-General or the Minister of Justice in person. The Solicitor-General replied that no one dealt with such applications. Upon my requesting him for an explanation of his answer he informed me that Section 1022 of the Code was a "dead letter" in the Law. Upon my pressing for a further explanation he informed me that the Minister of Justice had made it a rule that no applications under that section would be entertained. I briefly argued the matter with him,

pointing out to him what grave injustices might occur by treating this section in the manner above indicated. I suggested to him for example the case of a man convicted of murder. There is no provision apart from Section 1022 whereby an innocent man even if convicted of murder could, in the event of the discovery of new evidence which would absolutely establish his innocence, procure a new trial. The Solicitor-General thereupon suggested that the prisoner, in that event, might be pardoned, but as I pointed out to him a pardon necessarily implies guilt, so that such a man would still remain under the stigma of guilt and in the eyes of the world would still be a murderer, notwithstanding he might be absolutely innocent of the offence. The Solicitor-General then informed me that an amendment to the Code had been suggested whereby in cases of the kind under consideration application might be made to the Court of Appeal for a new trial. That amendment, of course, has not yet been enacted, and until it is enacted surely a prisoner is entitled to the benefit of Section 1022.

The opinion in which you state you concur is exactly along the lines suggested to me by the Solicitor-General and is equally applicable to a case of murder as to the case which I have placed before you for your consideration.

Let me refer for a moment to the first paragraph of that opinion:—"I apprehend that Section 1022 of the Criminal Code confers a power upon the Minister of Justice to order a new trial which may, perhaps, properly be exercised in a conceivable case, but I do not think that the conditions for the application of that section are satisfied merely by the production of a material witness discovered after the trial."

In what conceivable case could the power conferred upon the Minister to order a new trial be with more justice exercised than in the case of the production of a material witness discovered after the trial?

And again, assuming that a man had been convicted of murder and a material witness was dis-

covered after the trial who could establish the convicted man's innocence, would not that be a proper case for the exercise by the Minister of the power conferred upon him by the statute? Alternatively, would the Minister be justified in refusing the man a new trial and allowing him to be hanged in spite of the discovery of new evidence establishing his innocence? It is no answer to this that the Crown may pardon the convicted man, for as I have already pointed out, a pardon necessarily implies guilt and in such a case the convicted man must needs go through the rest of his life a murderer in the eyes of the public. Surely some opportunity should be allowed a man of establishing his innocence and of vindicating his character in such a case, and that is what the prisoner asks here, that he may be given an opportunity of vindicating his character.

I confess myself at a loss to understand the reasoning in the succeeding paragraph:—"While the Courts have always exercised a jurisdiction which is well-established to grant new trials in civil cases upon the ground of the discovery after trial of material evidence, that jurisdiction is exercisable only within strict limitations, and it has never been extended, either by common law or statute, to criminal proceedings. The Minister of Justice has no means of convening or hearing the parties, neither is any of the ordinary procedure prescribed for judicial proceedings available to the Minister for the purpose of conducting an enquiry, and it seems inconceivable that the Minister should, in these circumstances, be the repository of a power which is denied to the Courts and which can only be beneficially exercised under the safeguards which are incident to the ordinary judicial proceedings."

Such an argument might reasonably be put forward if the question of conferring such a power by statute were in issue, but the Minister is already by the statute made the repository of the power, which up to the present time is unfortunately denied to the Courts, and so long as no other procedure is provided for the grant-

ing of new trials, surely it is the duty of the Minister to exercise that power in a proper case, such as I submit the present case is.

Then, sir, take the next paragraph:—"Moreover, the facts of the present case do not satisfy the requirements of an application for new trial for subsequently discovered evidence even in a civil case, and the granting of a new trial upon the affidavits produced would operate as an invitation or precedent which would probably produce similar applications so numerous that it would be necessary to provide a special organization for disposing of them."

Assuming that the facts in the present case do not satisfy the requirements of an application for a new trial in a civil case, which, of course, I do not admit, there surely must be a distinction between the evidence required for a new trial in a civil case and that which would be required for a new trial in a criminal case. The rule is so elementary that I feel almost ashamed to propound it to you, sir, that whereas in a civil case the Court will decide upon a mere preponderance of evidence, in a criminal case the guilt of the accused must be proven beyond a reasonable doubt.

I therefore submit to you, sir, that the same considerations do not apply to the present application as might apply to an application for a new trial in a civil case.

Had the newly discovered evidence in the present case been before the trial Court I venture to submit that the Court could not possibly have refrained from giving the prisoner the benefit of the doubt.

With respect to the precedent which might be established were this application granted, I cannot conceive that such a precedent would be a bad one, for surely the Minister of Justice, the very fountain-head of Justice, should be the one person above all others who should rectify just such miscarriages as I submit there will be in the present case if this application is rejected.

With all due respect to you, sir, I may say that the last paragraph of the opinion seems to me almost

unworthy of comment. The suggestion that an innocent man should be either hanged or live the rest of his life a murderer in the eyes of the public because, forsooth, of a possible conflict between the Dominion and Provincial authorities, which suggestion this paragraph necessarily implies, shocks one's sense of justice beyond description. The opinion, as I have pointed out, is equally applicable to a case of murder as to the case which I have asked you to consider.

As I wish to do neither you nor my client any injustice in this matter, I desire you to reconsider the matter. I cannot conscientiously allow the matter to rest without protest. With all due respect it seems to me a shocking state of affairs when the Minister of Justice refuses to exercise the power expressly conferred upon him by statute and allows an innocent man to remain in jail for such trivial reasons as have been argued in the opinion emanating from your Department, at the same time knowing full well that there is no other procedure by which the unfortunate man can establish his innocence.

Yours truly,
(Sgd.) A. H. RUSSELL.

The strategy employed in the first paragraph of this letter, usually so successful with juries, was of no avail, and in answer to this letter I had the felicity of receiving merely a formal acknowledgment from the Secretary to the Minister, and this is the Government that professes itself astonished at the prevalence of Bolshevism.

In view of what I here set forth is it not high time for Section 1022 of the Code to be repealed and that the provincial courts of appeal be given jurisdiction to grant new trials in similar circumstances?

Yours truly,
A. H. RUSSELL.

OUR LONDON LETTER.

44 Bedford Row,
London, W.C. I.,
14th October, 1919.

The Editor,
"Canadian Law Times,"
Toronto.

SIR.—The Courts re-opened yesterday after the Long Vacation with an abnormally heavy list of cases for trial. Twelve months ago some 2,268 cases were entered in the Michaelmas lists. The cases now standing for hearing exceed 3,000, there being over 2,000 cases in the Divorce lists. In the King's Bench there are a large number of arrears to be cleared off, many of the actions having been entered for trial more than six months ago. In these circumstances it is not surprising to learn that the Lord Chief Justice, who is responsible for the conduct of business in the King's Bench Courts, has arrived at the conclusion that the practice of taking the judges of that division from their ordinary work to preside over non-judicial business and to assist in disposing of the business of the Divorce Court must be discontinued if Common Law litigants are to be treated fairly. If the increase in legal business is likely to be permanent, it is clear that the judicial staff will also have to be increased, if the work of the courts is to be carried on without that mischievous delay which once brought the administration of law into such grave disrepute.

The King has ratified the Peace Treaty, and the Instrument has been despatched to Paris. The King's "Instrument"—which includes a copy of the Peace Treaty bearing His Majesty's signature and the "wafer" great seal, the King's ratification on behalf of the British Empire; the Protocol, the agreement concerning the Rhine Provinces, and the Treaty respecting Poland—is largely printed on vellum, and is magnificently bound in gold embossed leather, the whole being held together by ribbons in the colours of the

four great Orders of Chivalry. With the ratification by France, which has also taken place, and the imminent ratification by Italy, the Peace Treaty may be expected to be in force almost immediately, for it is provided that the Treaty shall come into force when it has been ratified by three great signatory powers. Germany was the first power to ratify, the instrument of ratification being received in Paris on July 11th. It had been arranged that the ratification in Great Britain should not be finally completed until the Dominions had passed their several measures of resolution in favour of ratification. This has been done. No bill to ratify the Treaty was actually necessary in the British Parliament, since the power of ratification is vested in the Crown, but as Mr. Bonar Law explained to the House of Commons, in this case legislation is necessary to enable some of the principles of the Treaty to be carried out. The Peace Treaty Bill was formally introduced on July 3rd by Mr. Lloyd George, who referred to it as "the most momentous document to which the British Empire had ever affixed its seal." It received the Royal assent on July 31st.

With the ratification of the Treaty of Peace the League of Nations will come into actual operation. In this connection I would call attention to the message sent by the King to a great meeting held at the Mansion House yesterday to further the principles of the League. In the course of his message his Majesty said: "We have won the War. That is a great achievement, but it is not enough. We have fought to gain a lasting Peace, and it is our supreme duty to take every measure to secure it. For that nothing is more essential than a strong and enduring League of Nations. Every day that passes makes this more clear. The Government of Paris is a good foundation, well and truly laid. But it is and can be no more than a foundation. The nature and strength of the structure to be built upon it must depend on the earnestness and sincerity of popular support. . . I commend the cause to all the citizens of the Empire, so that, with the help of all

other men of goodwill, a buttress and a sure defence of Peace, to the glory of God and a lasting fame of our age and country, may be established." To be binding and effective the Covenant must, as Mr. Asquith said at the Mansion House meeting, be something more than a paper covenant. It must be a living instrument, and, what is far more important, that instrument must have the driving power which can only be supplied by the permanent conscience and the conjoint opinion of the civilised world. Success or failure depends not upon Governments, but upon peoples.

The Government are reported to be making steady progress along the road to a permanent settlement of the Irish question. A Cabinet Committee has been formed to draft a Bill to take the place of the present Home Rule Act, which in most quarters is regarded as unworkable. The Prime Minister is not a member of the Committee, to which, however, he has given very wide powers of investigation and recommendation. The Government are hopeful of being in a position to submit their proposals to Parliament in the coming Autumn session, which opens on the 22nd inst.

I would call attention to two recent decisions of more than ordinary interest. The first is that of *Fox* v. *Morrish & Co.*, a King's Bench case. Accountants, who were employed to prepare balance-sheets from the books of a business firm, stated the amount of "cash at the bank" as it appeared in the books, without examining the bank pass-book or obtaining any statement in reference thereto from the bank or informing the firm that they had not done so. The entries in the books were falsely made by a fraudulent clerk whose defalcations were not discovered as they would have been if the entries in the books had been checked by reference to the pass-book. It was held (1) that the accountants were negligent in not comparing the entries in the books with the pass-book or obtaining any certificate from the bank or informing the firm that they had not done so, and (2) that they were liable in damages for the amount of the defalcations which would have been discovered if the proper steps had been taken as to the

pass-book. In the second case, that of *The Hepworth Co.* v. *Ryott,* a film-producing company entered into an agreement with a film actor to act under a pseudonym, and a clause of the agreement provided that the pseudonym was to be the property of the company, and that upon the determination of the agreement the actor was not to use the pseudonym, and the actor acquired a reputation before the public under that pseudonym. It was held by Astbury, J., that the company by insisting on the use of the pseudonym had clothed the defendant with that name before the public, and could not now restrain him from using it, as such restraint would be inconsistent with his freedom to earn his living as best he could.

Professor Oppenheim, Whewell Professor of International Law in the University of Cambridge since 1908, died on the 7th inst. Born at Frankfort-on-Main in 1858 he made his mark as a jurist before leaving his native country. On settling in England his position as a jurist was at once recognized and his work on "International Law" of which the first edition was published in 1905-06 at once took its place among the leading books on the subject. When Professor Westlake retired from the Whewell Professorship in 1908, he was succeeded by Dr. Oppenheim. Though of German birth, Professor Oppenheim, who was naturalized in 1900, was a most loyal subject of Great Britain, and abhorred German methods of warfare. During the present year he published a volume on "The League of Nations and its Problems."

In my London Letter which appeared in the CANADIAN LAW TIMES for August, when referring to the call to the Bar of the Prince of Wales, I unwittingly did an injustice to the Middle Temple in claiming for the "Inner" Temple the richest store of royal associations. My remarks should have applied to the Middle Temple of which for very many years the late King Edward was a Bencher, indeed at the time of his death he was the senior Bencher of the Inn.

Yours, etc.,

W. E. WILKINSON.

BY THE WAY

LEGAL ETHICS.

Among the proceedings of the Canadian Bar Association we reprint the address or argument against a Code of Legal Ethics by Mr. Justice Riddell. The argument is backed up by the opinions of the leading jurists of Great Britain and Ireland. Nevertheless it is but fair to say that the general sense of the profession in Canada will be found to be in favour of a Code.

These opinions which the learned Justice has elicited and his own opinion represent the attitude of men who have arrived. They need no Code, any more than Lord Chesterfield needed to write himself letters on how to be the perfect gentleman. The Code is for the help of those who are still struggling; and still more as a guide to those who are just entering the struggle, namely, our students-at-law.

It is true that our learned lecturer rather sums up the discussion in defining the lawyer (i.e. the worthy lawyer) as a gentleman. Probably it is right that every man should standardize his conception of a gentleman. Then if he tries to live up to his standard he is a hero; if he uses his standard solely for the purpose of silently measuring others he is a prig; if he breaks silence and measures out loud he is a pup. Gentleman is a word that is easily and often overworked.

We feel that there should be a Code—a uniform starting point for our lecturers on legal ethics. But lest its framers, amplifiers, expounders and students should fall into the error of thinking everything comprised within its four corners like a contract under the

Statute of Frauds we should advise printing Mr. Justice Riddell's address as an appendix to the Code.

A CODE OF LEGAL ETHICS.

By William Renwick Riddell.

Justice of the Supreme Court of Ontario.

A Paper Prepared for the Canadian Bar Association Meeting at Winnipeg, Man., August, 1919.

The Canadian Bar Association honoured me by a request, through the President and Secretary, "to prepare an address on Professional Ethics to be delivered to the Association at its annual meeting in Winnipeg in August;" and the Convener of the Committee appointed at Montreal in 1918 on Professional Ethics, was good enough to call upon me in connection with the request. From what was said by Mr. MacMurchy it appeared that the real matters to be discussed were the advisability of a written Code of Ethics, and the contents of such Code if it should be considered advisable to formulate one. To both the Secretary and Mr. MacMurchy I expressed an opinion adverse to a written Code of Ethics; and both desired me, nevertheless, to prepare an address on the subject.[1]

In my own Province for nearly a century and a quarter, jurisdiction over the Bar has been exercised by the Law Society of Upper Canada, organized in 1797 under the authority of the statute of that year of the young Province of Upper Canada—and since that time no advocate has been heard by the Courts unless and until he has been called to the Bar by that Society. Full jurisdiction over the attorney or solicitor the Law Society does not possess: it prescribes the curriculum for, it educates, it examines, it certifies the fitness to be admitted as a solicitor of the candidate, but there its authority and duty end—and even that jurisdiction was not original, but was given by the statute of 1858. But in our system it has always been and is now the case that all but a very small percentage of solicitors are barristers, and of barristers are solicitors.

The first chapter of the first Statute of the Province of Upper Canada (32 Geo. III., c. 1), introduced the laws of England as the rule for decision in all matters of property and civil rights, while the criminal laws of England formally prescribed for the conquered colony by the Royal Proclamation of 1763 had been left untouched by the Quebec Act of 1774 (14 Geo. III., c. 85). Accordingly when the profession in the province was organized the law, civil and criminal, in force was the existing law of England (with a few trifling exceptions).

The Act of 1797 was intended to place the profession of law on much the same basis as in England, but the circumstances of the colony did not allow of this being fully accomplished. One attempt to introduce the English system of prohibiting the same person to be both barrister and solicitor was defeated by the Benchers themselves, a second by the Judges, and the third and last by the Legislature; and the system is too firmly established to be now shaken.

It may, therefore, be said with reasonable accuracy that the Law Society has jurisdiction over the profession at large.

The Bar and the Bench of our province have followed the traditions of England, recognizing that England is their intellectual ancestor. We in Ontario are inclined to claim, perhaps to make rather a boast, that the Bar and Bench of the western provinces have been largely recruited from our province and share our traditions. Where that is not the case, the traditions of the profession in England are equally potent as with us.

The Bar and Bench of the Maritime Provinces have their own traditions, but these, like ours, are based on England.

Our illustrious sister, Quebec, stands in a different position: her criminal law indeed is English in its origin, but her civil law is based not upon the Common Law of England, but upon the Civil Law of Rome. Yet most of her rules, customs and practices are the same as ours.

Remembering the history of our profession, I thought it wise to consult the Chiefs of Bench and Bar in England; and as Ireland has much the same system, and traditions, I at the same time consulted those in that land. Scotland has a law based on the Civil Law as has Quebec, and I asked the opinion of some of the leaders in Scotland.[2] Without a single exception, all who replied were opposed to a written Code of Ethics.[3]

The opinion of the profession in the British Isles is most persuasive, but, of course, it should not, it cannot be considered conclusive upon us, however closely we are affiliated, however much we owe to the Mother Country, however near the practice of the Courts. Circumstances in this Dominion, as in other Dominions, may make a difference advisable if not imperative in system.

As against the practice in the Old Land we may be inclined to consider that in the various States of the American Union—the usages of trade and of society, the "genius of the people" are much more near our own in many of these States than in England; while politically we are intensely British (and have no desire to change our position) in the general conduct of business, and of intercourse, in form and customs we are inclined rather to the American. Most of the Bar Associations of the various States of the Union have their formal Codes of Ethics as has the general Society—the American Bar Associa-

tion. I am favoured in being an honorary member of several of these Bar Associations, and have enjoyed the privilege of frequent and somewhat close association with their members; and I have found an almost universal approval of the written Code. Although in most cases other reasons were alleged for that approval, I am wholly of the opinion that in many instances that view is due in no slight degree to the fact that the United States and the separate States have all a written Constitution. The mind of the American lawyer naturally and instinctively inclines to written formulation of all precepts, all rules, all principles.

The difference in the connotation of the words "Constitutional" and "Unconstitutional" in the American usage and our own will illustrate my meaning. In the United States the "Constitution" is a written document of so many words and letters, with us the Constitution is the indefinite and indefinitely formulated principles upon which a British people should be governed—what is "Constitutional" and what is "Unconstitutional" in the United States is for the Court to decide on legal principles and methods by an examination of the formal document to be known and read of all men—in Canada it is for Parliament, or in the last resort the electorate, by the consideration of what is for the benefit of the people. In the United States anything transgressing the written document is illegal however wise it may be. With us to say a proceeding is "Unconstitutional" is to say it is legal, however unwise, or even oppressive, it may be. Whether my impression of the cause of the formulation of a Code of Ethics in the United States is well founded or not, it is manifest that the practice in that land is not binding upon us, like as the two countries are in most particulars.

I propose, therefore, to attack the question without reference to other countries, and briefly to state the conclusions I have arrived at. I may be permitted to say that these conclusions are not formed, though they may be stated, now for the first time.

In the first place it may be assumed that it is not proposed to lay down a Code, disobedience to which would result in disbarment temporarily or otherwise. Our Law Society of Upper Canada has ample power to disbar in a proper case, but the power has been exercised only in the case of crime whether after conviction or otherwise. So far as I know it has never been suggested that a Code of Rules should be laid down to govern the Discipline Committee or Convocation in their duties in that regard, and I can see infinite difficulties in the way of such codification.

Not to dwell upon that phase, however, let us consider the real proposition, which is to lay down a Code the breach of which will lead to the disapproval of professional brethren, to exclusion from association and fellowship, to ostracism by respectable members of the Bar. If it were proposed to make the

Code a Penal Code violation of which would render the offender liable to disbarment, legislation would be necessary, and many considerations would arise which may now be passed over—considerations which to my mind would be fatal to the proposition.

What of a Code without such consequences? of a Code intended to govern the conduct of the practitioner, but the violation of which would involve only social punishment? or a Code intended simply as advice as to conduct?

It seems to me much like drawing up a Code of Etiquette to make a gentleman.[4]

When I used to deliver lectures to the students of the Osgoode Hall Law School on Legal Ethics, I devoted most of my time and efforts to showing that the profession of law is a liberal as well as a learned profession, that there is and can be nothing in the practice of law inconsistent with the highest type of scholar, gentleman, and Christian. With that as a text all else follows—the lawyer, a gentleman, will act as such, he will treat all, whether professional brethren or laymen, as he would be treated in like case—that, it seems to me, is the whole of the law and the prophets. I would have in every law school two or three lectures in each year on legal ethics in that sense—lectures either by the president or (preferably by) some one in active and extensive practice, devoted to inculcating in the mind of the students the all-important fact that the lawyer who is worthy of his profession is not a mere money making machine, but a gentleman respecting himself and his fellow men—he may and should make all the money he honestly and honourably can, but only so much as and how he honestly and honourably can. Is there any more need for a Code for lawyers than for members of a club? Both are expected to act as gentlemen, but no one would think of codifying the duties of club members. In that view a Code is superfluous, unnecessary.

There are, however, positive objections to a Code which states any but the most indefinite generalities. Any Code which entered into particulars would in my view do more harm than good — and for two reasons: First, when a Code of Rules has been formulated it is most natural, almost inevitable indeed, for its provisions to be considered exhaustive; whatever is forbidden is wrong, and in most minds the old logical fallacy of the "undistributed middle" is not avoided, but it is considered that what is not forbidden is not wrong. When one is charged with wrong doing, and told that he must act in a particular way, his defiance is "on what compulsion must I?" "It is not so written in the Code."

It is the natural and inevitable consequence of any written code to divide sharply what is forbidden from what is not—and what is not forbidden too often is considered to be allowed.[5] Anyone who is accustomed to refer to a written Code for the rule to direct his conduct will be apt to believe that it is com-

plete, and will generally give himself the benefit of any doubt or omission.[6]

Again, unless I am quite in error, any attempts to particularize would be dangerous. Let me take two examples.

A well-known compilation by a Bar Association of the highest rank both as to members and otherwise, has it "His," *i.e.*, the lawyer's, "appearance in Court should be deemed equivalent to an assertion on his honour that in his opinion his client's case is one proper for judicial determination." That I make bold to deny—while the lawyer may not bring into Court a dishonest claim, or set up a dishonest defence (because he is an honest man, and the law compels no man to dishonesty), the client is entitled to the services of his lawyer to enforce any claim or defence which is not dishonest; the client is entitled to the full and candid opinion of his lawyer, but when that is given he is entitled to have his case put to the Court whatever may be the lawyer's opinion on the law. Neither Court nor client is at all concerned with the opinion of counsel—the client demands, the Court enforces the law, as it is found to be—that is the duty of the Court, the right of the client. Counsel makes no assertion by implication of his own opinion when he argues the case of his client, and it would be unjust and improper to consider that counsel when arguing is representing that there was in his opinion doubt as to the law.[7]

It may be said that I have misconceived the meaning of the rule which I am discussing—if so and if the rule means simply that counsel in arguing a case is giving it an assurance that his claim is an honest one, this indicates another danger arising from the language employed. The formulation of rules free from ambiguity unless they be expressed in the most general and therefore futile terms is of enormous difficulty; and not only *dolus latet in generalibus* but the dishonest lawyer's ingenuity will enable him to misconstrue language with some plausibility—and where all else fails he can plead misunderstanding.

Another example: The solicitor for a mortgagee demands $14.75 interest due—the mortgagor sends him a cheque for $14.50; the solicitor returns it and brings an action for foreclosure.[8] The Court and the profession are shocked—and probably such conduct would be strongly animadverted upon by the Code builders; but the conduct of the solicitor may have been wholly justifiable. The mortgagor may have been following a course of petty dishonesty—this may have been but the culmination of a long series of attempts to defraud his creditor out of small sums, and the action for foreclosure brought after warning of the effect of such conduct if continued; it may be that the mortgagee has been put to trouble and expense in getting his own, and that the action for foreclosure was in simple self-defence.

Circumstances are so different that what looks like oppression in the abstract case is plain dealing and good business in the concrete.

We should, it seems to me, avoid creating an artificial conscience. It is well known that a statute against a particular course of conduct will inevitably bring about a state of public opinion that such conduct is morally wrong, however innocent it may be in fact. A familiar instance is the feeling now widespread that it is wrong for a tradesman to prefer one creditor to another. To anyone who takes the trouble to think over the matter, it will be plain that sometimes it is consistent with the highest morality to do that very thing—yet in our Ontario law it is allowable only if money is paid. As though there were in morals a difference between giving money and money's worth!

Again, all common law courts are adamant against what has been branded with the horrid name of champerty—no lawyer can acquire an interest in the subject matter of an action. A young mining engineer without much business finds that there is a "mining proposition"—the location is owned by a man too poor or too indifferent to develop it and ascertain its value—the engineer looks over the ground and sees a good prospect of making the mine pay, and he enters into a contract with the owner that he will at his own expense develop the mine for half the profits. That is good business, good morals, and is for the advantage in common of both parties; and the law approves, and will enforce such a contract.

The brother of the engineer, a young solicitor, finds out that a man has a claim to valuable property but is too poor or too indifferent to enforce his claim—the solicitor examines into the title, etc., and sees a good prospect of recovering the property, and he makes a contract that he will at his own expense bring an action and recover the land for half the profit. No Court would approve or enforce such a contract—it may be good business and for the advantage in common of both parties, but the Court says it is bad morals. Wherein does the difference between the two cases consist?

We have in the latter case an artificial conscience.

I know it will be answered *interest reipublicae ut sit finis litium*. But that does not mean that it would be for the advantage of people at large, that there should be no law suits—so long as injustice prevails a lawsuit to end an injustice is infinitely better—and, I add, infinitely more in harmony with the genius of our people—than passive submission to the injustice. The maxim means that it is for the interest of the people that a lawsuit when started should be carried to a conclusion with all due expedition—and if it means anything more it is that it will be a good thing for the people when wrong shall cease, and there will be no further need for litigation.

The real difference is that one contract is forbidden by law and the other is not.[9]

So long and in such places as this rule is law, it is proper to say, as one Code does, "the lawyer should not purchase any interest in the subject matter of the litigation which he is conducting"—but that there is a general ethical rule I deny.

Contingent or conditional fees are in the same category.[10]

These are some of the reasons which, to my mind, make it inadvisable to formulate a Code of Ethics.[11]

My opinion in short is that a Code of Legal Ethics, if sufficiently general, is unnecessary—if specific is dangerous.

WILLIAM RENWICK RIDDELL.

NOTES.

Note 1.

The following is the correspondence.

156 Yonge St., Toronto,
1st May, 1919.

THE HON. MR. JUSTICE RIDDELL,
Osgoode Hall, Toronto.

Re Professional Ethics.

DEAR JUDGE RIDDELL:—

At the annual meeting in Montreal, a committee was appointed on Professional Ethics. Mr. Angus MacMurchy, K.C., was named as convener. The committee was instructed to take the code of Legal Ethics prepared by the American Bar Association as a basis for a Canadian Code, and to report thereon. At the Council meeting on Monday, it was decided to ask yourself and Mr. Justice Mignault of the Supreme Court to prepare an address on professional ethics, to be delivered to the Association at its annual meeting in Winnipeg, during the last week in August. I trust that you and Judge Mignault will be able to help us on this important subject. Possibly some co-operation might lessen the work. In the meantime, I am enclosing a copy of the American Code.

Yours faithfully,
R. J. MACLENNAN,
Secretary.

OSGOODE HALL,
Toronto, 2nd May, 1919.

R. J. MACLENNAN, ESQ.,
Secretary Canadian Bar Association,
156 Yonge Street, Toronto, Ont.

MY DEAR SIR,—

Your letter of yesterday is at hand. I shall, if physically able, prepare something on professional ethics for the meeting in Winnipeg. I should, however, say that I am wholly opposed to anything in the way of a written code of ethics for the profession, and if I write I shall write in that sense. Perhaps after this expression of opinion, which has been formed after long and careful consideration, your Association would not care to have anything from me.

Yours very truly,
WILLIAM RENWICK RIDDELL.

Government House,
Winnipeg, 3rd May, 1919.

THE HON. W. R. RIDDELL,
Supreme Court of Ontario, Toronto.

MY DEAR MR. JUSTICE RIDDELL,—

At the last meeting of the Council of the Canadian Bar Association, held on Monday, it was unanimously decided that you and Mr. Justice

Mignault be asked to suggest a code of professional ethics for the next annual meeting. In order to facilitate your work, it was thought that the American Bar Association's code might form a good basis for a Canadian code. We think it very desirable that in every Province of Canada the same professional ethics should prevail. Having been so long at the Bar, you will appreciate this, and the opinion was expressed that there were no others better qualified than you and Mr. Justice Mignault to take up this subject and give the Association the benefit of your thought. An important place will be left on the programme for this.

I am, yours very sincerely,
J. A. M. AIKINS.

Note 2.

A letter in the following form was sent (amongst others) to
The Lord Chancellor.
The Lord Chief Justice.
The Attorney-General, and
The Chairman of the General Council of the Bar, at London; also to
The Lord Chancellor of Ireland.
The Lord Chief Justice, Ireland.
The Attorney-General, Ireland, and
The President of the Incorporated Law Society of Ireland, at Dublin, and also to
The Lord Justice General.
The Lord Justice Clerk, and
The Lord Advocate at Edinburg.

"Mr. Justice Riddell presents his Compliments to the Lord Chief Justice of England.

Mr. Justice Riddell has been asked by the Canadian Bar Association to write a paper, or deliver an address, at the coming meeting in August of the Association on a Code of Legal Ethics.

Mr. Justice Riddell is himself not in favour of a written code of ethics, and sees no necessity for it; but it is known that others have a different opinion.

Mr. Justice Riddell would therefore ask the Lord Chief Justice if there is a written Code of Ethics for the legal profession in England, and also whether the Lord Chief Justice approves of such a code. If such a code exists, Mr. Justice Riddell would be glad of a copy of the same. The legal profession in Ontario, as it at present exists, began in 1797, and has so far found no necessity for a code.

May 6th, 1919."

Note 3.

The following letters were received:—

1. From the Lord Chancellor.

"HOUSE OF LORDS, S.W.I.

SIR,—

I am directed by the Lord Chancellor to reply to your memorandum of the 6th of May, with reference to the address proposed to be delivered by you at the meeting of the Canadian Bar Association on a Code of Legal Ethics.

There is not in England any written code regulating the etiquette and practice of the Bar. The General Council of the Bar from time to time deals with cases submitted to it for decision or advice with reference to practice and etiquette, and the answers to these questions are published in the annual statement issued by the Council. The Bar Council has, however, no disciplinary powers. Certain rules with reference to practice as to retainers were prepared by the Council of the Law Society in consultation with the Bar Committee (whose place has now been taken by the General Council of the Bar), and sanctioned by the Attorney-General in July, 1892. The decisions or opinions of the General Council of the Bar and the rule as to retainers will be found printed in the Yearly Supreme Court Practice, 1916, at page 2054. These documents, however, do not constitute a complete code in the matter.

Questions arising with reference to the conduct of barristers, students of the Inns of Court, in which the conduct of any such barrister or student is impugned, are dealt with in the first place by the Benchers of the Inn to which the barrister or student belongs, and on appeal by the Judges of the High Court sitting together. The decisions of the Benchers and of the Judges in the case of an appeal are, as a rule, not published except in so far as they impose any penalty upon the barrister or student concerned.

In addition, there is, as is no doubt well known to you, a considerable floating body of practice and tradition in these matters, which for the most part, is not committed to writing, and certain bodies of barristers, for example, the members of a particular circuit or Sessions mess, are subject to rules regulating the conduct of the members of the circuit or mess, which in some cases are and in others are not committed to writing.

While on broad questions of professional etiquette and practice, no difficulty arises, and any member of the Bar can without difficulty regulate his conduct according to the view generally accepted in the profession, difficult questions sometimes arise under general or local rules, whether written or otherwise. It is open to any member of the Bar in any such case to submit the matter for advice or decision to the General Council of the Bar.

So far as the solicitor's profession is concerned, I am to suggest that you should seek advice from the Law Society, whose Secretary is Mr. E. R. Cook, Law Society's Hall, Chancery Lane, London W.C. 2.

I am, sir,

Your obedient servant,

CLAUD SCHUSTER."

THE HON. MR. JUSTICE RIDDELL.

2. From the Lord Chief Justice.

"ROYAL COURTS OF JUSTICE,

London, W.C. 23/5/19.

The Lord Chief Justice, England, presents his compliments to Mr. Justice Riddell, and in reply to his letter of the 6th inst., begs to inform him that no such written code of ethics exists in England, nor is His Lordship of opinion that there is any need for it.

HON. MR. JUSTICE RIDDELL,

Supreme Court of Ontario, Toronto."

3. From the Attorney-General.

"ATTORNEY-GENERAL,

May 23rd, 1919.

The Attorney-General presents his compliments to the Hon. Mr. Justice Riddell, and in reply to his letter dated the 6th inst., has to say that there is no written code of ethics for the legal profession in England. The decisions of the Bar Council on questions of professional etiquette form a more or less code for the Bar, and these are collected and published in a convenient form in the Annual Practice and in the Yearly Practice of the Supreme Court (e.g., Yearly Practice for 1918, vol. 2, p. 2054, "Etiquette and Practice of the Bar"). The Attorney-General does not think that a written code is desirable. Such a code could not be complete, because changing circumstances are bound to give rise to new questions from time to time."

4. From the Chairman of the General Council of the Bar.

"5, Stone Buildings,

Lincoln's Inn, W.C. 2,

May 26, 1919.

SIR,—

I am directed by the Chairman of the General Council of the Bar to reply to your letter of the 6th inst., and to say that, while there is no written code of ethics for the legal profession in England, the Bar Council have from time to time been asked to express their opinion on professional conduct in certain cases, and the rulings appear under the heading "Etiquette and Practice" of the Bar in the "Yearly Practice

of the Supreme Court, 1918," published by Butterworth & Co., Bell Yard, London E.C., and the "Annual Practice," published by Sweet & Maxwell, Chancery Lane, also in Halsbury's Laws of England, vol. II. p. 357, published by Messrs. Butterworth & Co., of London.

I am, sir,
Your obedient servant,
HAROLD HARDY,
Secretary.

THE HON. MR. JUSTICE RIDDELL,
Toronto."

5. From the Lord Chancellor of Ireland.

"LORD CHANCELLOR, IRELAND,
Secretary's Office,
Four Courts, Dublin,
21st May, 1919.

The Lord Chancellor of Ireland presents his compliments to Mr. Justice Riddell and informs him, in reply to his inquiry of the 6th inst., that there are only a few rules, pertaining to retainers, for the legal profession in Ireland, and that he does not consider any further written code of ethics to be necessary."

6. From the Lord Chief Justice (Ireland).

"KING'S BENCH DIVISION, IRELAND,
Four Courts,
Dublin, 23rd May, 1919.

DEAR MR. JUSTICE RIDDELL,—

There is no written code of ethics for the legal profession in Ireland, and the necessity for one has not been felt.

Acts of professional misconduct can be dealt with in two ways, (*a*) the delinquent can be brought before the Bar Council, which is chosen by and is representative of the profession, and they have power to admonish, and, in an extreme case, to refuse to accept the person's subscription to the Law Library, which would have the effect of excluding him from practice, or (*b*) The Benchers of the King's Inns, in cases of grave misconduct, can disbar the delinquent, subject, as in England, to an appeal to the body of Judges.

The practice which prevails here of all barristers meeting in one library—which is the centre of professional work—has the effect of creating an *esprit de corps*, and at the same time enforcing a spirit of discipline which is absent in England.

In matters of professional etiquette, we follow the general rules which have been laid down from time to time by the General Council of the Bar of England, of which I send you a copy taken from the Annual Practice.

As regards solicitors, charges against them are investigated before a Statutory Committee of the Incorporated Law Society, whose report is brought before the Lord Chancellor, with whom the ultimate decision rests.

Yours sincerely,
THOMAS A. MALONEY.

THE HON. MR. JUSTICE RIDDELL, etc."

7. From the Attorney-General for Ireland.

"IRISH OFFICE,
22nd May, 1919.

DEAR SIR,—

I am directed by the Attorney-General for Ireland to acknowledge your inquiry of May 6th, and to acquaint you with the following facts in answer to the same.

No code of legal ethics exists for the Irish Bar.

The ethics of the profession are controlled by the public opinion of the Bar. The Benchers of the King's Inns exercise jurisdiction over members of the Bar in cases of violation of professional decorum? The standard of professional conduct is also reviewed by the Bar Council, but there is no coercive jurisdiction in this body.

Yours faithfully,
HUGH MONTGOMERY MILLER,
Private Secretary.

THE HON. MR. JUSTICE RIDDELL, etc."

8. From the Chairman of the Incorporated Law Society of Ireland.

"Dublin, 21st May, 1919.

Mr. Robert G. Warren, President of the Incorporated Law Society of Ireland, presents his compliments to Mr. Justice Riddell, and in reply to his communication of the 6th inst., begs to say that there is no written code of ethics for the legal profession in Ireland, and the President does not approve of such a code."

From Scotland.

9. From the Lord Justice General.

"COURT OF SESSION, SCOTLAND.

The Lord Justice General presents compliments to Mr. Justice Riddell, and begs to say that in Scotland there is no written code of legal ethics. There is, however, an unwritten code which is regarded by all Scottish lawyers as sufficient. The Lord Justice General sends herewith a lecture delivered by one of the leaders of the Scottish Bar on the subject of "The Ethics of Advocacy." This lecture contains the fullest and most exhaustive exposition of the subject known to the Lord Chief Justice General."

10. From the Lord Justice Clerk.

"22 Moray Place, Edinburgh,

DEAR MR. JUSTICE RIDDELL,— 24th May, 1919.

I had yours of the 6th inst. We have no written code of ethics—our law of practice in the matter depends on practice and tradition. I understand that the Lord President has sent you a copy of a paper by Mr. Macmillan of our Bar, which is the best pronouncement on the subject with which I am acquainted.

Our Dean of Faculty is the arbiter for our Bar in all such questions.

I must say I think it would be very difficult, and I think somewhat dangerous, to formulate a *written* code of ethics.

Yours,

CHARLES SCOTT DICKSON,

Lord Justice Clerk."

11. From the Lord Justice Advocate.

"THE LORD ADVOCATE.

The Lord Advocate presents his compliments to Mr. Justice Riddell, and begs to acknowledge receipt of Mr. Justice Riddell's letter of the 6th inst.

There is in existence no written code of ethics for the legal profession in Scotland.

There are a few rules regulating counsel's retainers which—for the convenience of the profession generally—have been more or less officially published, and are printed in the annually printed "Parliament House Book," itself an unofficial publication, but even these rules are no more than a formulation of professional custom, as instructed by the trend of decision in individual cases by the Dean of the Faculty of Advocates.

I held office as Dean for several years; and, in accordance with the practice of my predecessors, I referred all cases of professional conduct which were referred to me, to solution in accordance with the simple rules of honour. Our tradition has always been that the more difficult the point is, the more strictly should the test of honourable conduct be applied. And it is obvious that the application of the rules of strictly honourable conduct consorts very ill with any attempt to reduce the rules of honour to a written code.

The Lord Advocate agrees with Mr. Justice Riddell in deprecating any attempt to frame a written code of ethics. Like Mr. Justice Riddell he sees no necessity for it."

Parliament House,
Edinburgh."

[The Lord Justice General was good enough to send me a paper on "The Ethics of Advocacy," by H. P. Macmillan, Esq., K.C., read before the Royal Philosophical Society of Glasgow, which sets out clearly and powerfully the conception of the duty of the advocate or barrister which has always prevailed at our Bar.—W. R. R.]

Note 4.

This is not wholly original—I owe it in essence to Dr. Scott of Edmonton, who did me the honour to call upon me with Mr. MacMurchy.

Note 5.

I have conversed with many American lawyers of eminence on the subject of a written constitution, and with (I think) one exception, they have all agreed that the written Constitution (necessary as it was) has had the effect of dulling to a certain extent the perception of legislatures between right and wrong; legislators are apt to refer as a test of right and wrong to the provisions of the constitution. Whatever is not forbidden by the constitution is allowable for the legislature and executive.

Note 6.

We have only to look at the way in which many corporations are conducted to find an instance—a company will, as a rule, consider itself justified in acting in any way not forbidden by the "Companies Act."

Note 7.

I remember very early in my own practice, the late Vice-Chancellor Proudfoot, when Mr. William Kerr, Q.C. (afterwards Senator for the Dominion), advanced in argument what seemed to be an untenable proposition, saying to him, "But, Mr. Kerr, is it your own opinion that that is the law?" Mr. Kerr did not answer; he stopped in his argument, and remained silent for a moment, when the Vice-Chancellor said: "I beg your pardon, Mr. Kerr; I should not have asked that question." Mr. Kerr said, "I thank your Lordship; I was placed in an unfortunate position by the question. If I answered it in the negative, I might prejudice my client's case, if the affirmative, I would add nothing to my argument." I have never forgotten that episode, and to this day it is always an unpleasant thing for me to hear a counsel say, "I think the law is so-and-so." However earnest counsel may be, however firmly convinced of the soundness of his argument, he should remember that it is his argument the Court wishes, not his opinion.

Note 8.

This is not an imaginary case, but an actual occurrence; the solicitor resides and practices in Toronto. When speaking of possible justification, I do not suggest anything as to the facts of the particular case.

Note 9.

That the Statutes of Champerty are in affirmance of the Common Law may be doubted—whatever the ostensible reason for the rule, it seems to me that it is but another illustration of the apothegm, *beati possidentes*.

Note 10.

Of course in these cases I am considering the case of the solicitor particularly; there are reasons of prudence which may prevent the barrister from having anything to do with the subject matter of litigation or with contingent fees—but I insist the reasons are reasons of prudence and not of morals.

Note 11.

If we are to have a code of ethics, I shall be glad to do all in my power (if it be desired) to assist in formulating such a code as will be most useful to my brothers-in-the-law.

CANON LAW.

We are all familiar with vague references to Civil and Canon Law in the introductory chapters to our text books on Equity; and we concern ourselves very slightly about Civil and not at all about Canon Law. Most of us are practical and eat our celery and asparagus on toast without much curiosity as to what these growths look like in and under the ground.

Occasionally, however, we have yearnings to leave off being attorneys and to become lawyers, with inclinations to delve into the origins of legal doctrines. We therefore take occasion to publish Prof. Sherman's lucid article which (the author not being a Roman Catholic) has no propaganda-value but is written from the point of view of the scholar and not the ecclesiastic. It is interesting to learn that not only our doctrines of Equity but also the origins of our Criminal, Constitutional and International Law are (according to your point of view) inspired or infested with the spirit of Canon Law. Professor Sherman has at least done us the service of telling us where to find that Canon Law which was best recognized at any given period. We may not want to seek but we at least know where to find.

PIRATICAL BONUSING OF INDUSTRIES

We quote the following sensible comment from the *Hamilton Herald*:

Of the resolutions adopted by the Union of Canadian Municipalities at its annual meeting in Kingston none is worthy of more attention than the reso'ution against the subsidizing of local industries by means of bonuses, grants of free sites, or exemption from taxation. The Provincial Governments are to be asked to enact legislation preventing this wasteful competition among municipalities. Few ambitious urban municipalities can plead innocence in this matter. Hamilton is one of many which have sacrificed too much for the sake of industrial expansion. High tax rates form one unpleasant effect of the bonusing abuse.

There is a law on the Ontario statute book designed to check the industrial bonus evil, but it is commonly evaded, and when municipalities violate it they do not find it hard to get the Legislature to legalize their violations of it. A stop should be put to this practice. If the law were impartially enforced and no exceptions made, there would be less temptation on the part of municipal councils to offer bribes to industrial promoters to open plants in towns willing to pay for them.

Unhappily, it too often happens that the manufacturers who have to be subsidized to locate in a place must eventually be further subsidized to prevent them removing later to some town which holds out better inducements.

The provisions of Sec. 396 of the Ontario Municipal Act do not seem at all badly drawn; but their enforcement is left pretty much at large. Normally when a municipality steps outside of its legal limitations some indignant ratepayer is willing to become a village Hampden and come forward with a motion to quash. But the abduction of an industry from a distant municipality is a very venial form of dishonesty in the eyes of a ratepayer of the piratical burg. Some convenient machinery should be devised whereby the bereaved municipality could get quicker action than at present.

LAWS AS TO THE MORATORIUM.

Lawyers need not to be reminded that it will not do to assume that the same war-time legal restrictions exist in other jurisdictions as to the collection of mortgage and other debts as in their own provinces. For instance, there are provisions in force in Saskatchewan that do not hold in Ontario. It will therefore be necessary to get hold of local information before rushing too enthusiastically into the pursuit of the debtor. We print the following article which will be of interest to all who have business relations with Old France. It will be seen that the French laws embrace a much wider field of suspended remedies than in most Canadian jurisdictions.

Existing French Laws.

Questions of Adjournments and Delays.

Amongst the laws and decrees enacted during the course of the war to deal with pending circumstances very many thereof will be shortly repealed through the return of the state of peace, and amongst others all the enactments relating to adjournments and delays. This return to the common law in reference thereto may bring about, in certain cases, unpleasant consequences to private individuals who neglect to take the necessary precautions to protect themselves from the same. We will deal with these cases in detail.

In order to understand the conditions which will come into operation it is necessary to explain the regulations which are actually in force.

A decree, passed at the outset of the war, on the 10th August, 1914, the effects of which were retroactive inasmuch as they took effect from the date of the mobilisation, namely from the 2nd August, 1914, suspended all the statutes of limitation in civil, com-

mercial and administrative matters, and all delays for notifying, carrying into execution, or appealing against the decisions or judgments of the Courts.

This suspension applied also to mortgages, to their registration, to their renewal, to transcriptions and generally to all deeds which must be carried into effect within a prescribed time according to French law. This suspension applied, in addition to the dates indicated in some contracts for the nullity thereof in the event of the non-carrying out of certain clauses at fixed dates. The above decree, which was furthermore supplemented by a later decree on the 15th December, 1914, pursuant to its clauses authorised in certain particular cases the removal of the suspension of the delays. But to carry out the same a special procedure was enacted: a registered letter had to be sent to the opposite party by the official process server (Greffier) calling upon him to appear before the President of the Tribunal. This judge, if he considered that the circumstances justified the same, could make an order removing the suspension of the delays in question. The effect of this procedure was to notify to the defendant that the procedure with regard to time was revived so far as he was concerned.

This system is still in force at the present time, but as we have stated above, it will probably very shortly cease to exist.

The decree of the 10th August, 1914, specified clearly that it would simply remain in force " for the duration of the hostilities."

Moreover the French Government lodged at the bureau of the Chamber of Deputies on the 31st July, last, a project of laws that, as regards the carrying into effect of laws, decrees and contracts, to which the state of war applied, the date of the publication in the " Journal Officiel " of the Treaty of Peace with Germany would be considered as being that of the " Cessation of hostilities " and that the delays which

should commence or be continued at the cessation of hostilities would also commence upon the date of the publication of the treaty of peace in the "Journal Officiel."

The Parliament has just voted the law submitted to it, by the Government. Consequently the promulgation of the treaty of peace and "the cessation of hostilities" will take place upon the same date.

We shall now explain the conditions under which the renewals of the adjournments and delays will be carried out.

(1) With regard to those which would normally have expired during the mobilisation, the periods will be the same as those existing at the first date of the mobilisation. The danger to which I referred at the outset of this article relates to short periods applying to such prolongation. Moreover it is during these few days that the parties interested must take the necessary measures to protect their interests. Let us take an example: A judgment has been obtained against a defendant and notified on the 10th June, 1914. During two months, namely until the 10th August, 1914, the losing party had the right to appeal against the said judgment. The times for appealing having been suspended from the 2nd August, 1914, eight days remained within which to act. These eight days commence to run by law from the date of the cessation of the hostilities without any special advertisement being given to the parties. Thus, in the case to which we allude eight days only after the cessation of hostilities the losing party will be deprived of his right to appeal against the judgment given against him. It is, under the same conditions, that the times must be observed for executing by default, those relating to the statutes of limitation for thirty years, and those relating to the payment for goods supplied to a non-trader, and those relating to nullities of contracts, etc., etc.

(2) Delays which would have expired normally within six months from the cessation of hostilities are prolonged for six months.

(3) Delays which normally would come to an end more than six months subsequent to the cessation of hostilities are in no way increased, nor their dates of expiring modified.

It is important therefore for foreigners interested in legal and other proceedings in France to have the above facts brought to their notice.

CAMILLE DENOYER, Avocat

A BRIEF HISTORY OF MEDIEVAL ROMAN CANON LAW.

In the year 1918 appeared the latest of European codifications of law, the Code of Canon law of the Roman Catholic Church.[1] Cardinal Gasparri's masterly and lucid codification, the newest of all the world's Modern Codes, is remarkable for three things: it is a codification of ecclesiastical law imitative of the form of the current European codes of secular law; it is the first real code of ecclesiastical jurisprudence since the medieval Corpus Juris Canonici; and it is a living refutation of the false belief that Latin is too dead or atrophied for modern scientific uses,—Latin is the language in which this new code is written.

This new Code is one of the heirs of medieval Canon law, and most closely resembles its ancestress. Undoubtedly the new Code will excite a scholarly interest in the Canon law of the medieval Western Latin or Roman Church, from which the various Protestant churches of modern times have separated: for medieval Roman Canon law is a sort of common heritage of all Western European and allied Christendom. It is hoped that the following historical introduction to medieval Canon law will be found useful to investigators in ecclesiastical jurisprudence.

Rise of the temporal power of the Roman papacy in the 8th century. In the years 751-752 A.D. the temporal power of the bishops of Rome began. The Germanic invaders of Italy under King Aistulf had conquered Ravenna and were threatening Rome itself. The Bishop of Rome applied to Pepin of France for help. Pepin was to be *Patricius* (Count) of Rome, while the Pope was to receive the exarchy of Ravenna,

[1] *Codex Juris Canonici Pii X Pontificis Maximi jussu digestus, Benedicti Papae XV auctoritate promulgatus. Praefatione, fontium annotatione et indice analytico-alphabetico ab emo. Petro Card. Gasparri auctus.* New York, Kenedy & Sons, 1918. It went into effect May 19, 1918.

the last remnant of the Roman Empire in central Italy. Help was afforded, but the Bishop of Rome did not obtain tranquil possession of the exarchy of Ravenna until thirty years later. Then the Imperial power of the Roman Empire in central Italy fell to that authority, which, alone seated at the old capital, had increased by the resort to it in those troubled times, and finally had become to be regarded as the legatee of the Imperial Cæsars long ago passed away in the Eternal City. At first the Bishop or Pope was but master of the exarchy or province of Ravenna.

But, when at the opening of the 9th century the Roman Empire of the West was revived by Charlemagne and his successors, Rome itself was placed under the joint jurisdiction of both Emperor and Pope. This jurisdiction of Rome common to both lasted for centuries, and as the Popes waxed bolder and bolder, was a source of great dispute and turmoil. In the end, the Pope lost the battle as both universal spiritual and temporal sovereign, and in our own times (nearly 50 years ago) he was despoiled of the temporal power over the Papal states,—that temporal power which was then 1100 years old.

Lancelot, who wrote a book of Institutes on the Canon law in imitation of the famous Emperor Justinian's Institutes at the desire of Pope Paul IV,[2] states the ultramontane doctrine as follows: "When the civil laws are not contrary to evangelical and canonical decrees, they are worthy of all reverence: the church makes use of them against heretics, tyrants and all wrong-doers. Nevertheless they have not by themselves any authority, for whatever is ordained even in favor of churches, is without any force unless it be approved by the church." This position of the Latin Church is far removed from its situation in the days of Constantine and his successors, and omits all reference to the original inferiority of the church to the State in temporal or civil affairs. The Greek or East-

[2] Sherman, *Roman law in the modern world*, vol. i, s. 228.

ern Church never advanced any claims to supreme authority temporally, as did the Latin Church, nor did it recognize the claims of the Roman Bishop to be primate of all the church militant. The Greek Church was too near the Byzantine Roman Imperial sun, which scorched it with its rays at critical times in its history when it would shine more powerfully than the State itself.

The eleventh century separation in 1054 A.D. of the Church into the Eastern Greek Orthodox Church and the Western Latin Roman Catholic Church. About 300 years after the Bishop of Rome began to attain to temporal power and put forth his claims as primate of the church universal, there ceased to be a Church Universal, and consequently a universal Canon Law (whether this be considered as civil ecclesiastical law or pure ecclesiastical law.) The Catholic Church was rent in twain by the separation of the Western Latin Church and the Eastern Greek Church in 1054. Controversies between these churches of the orthodox Trinitarian character had not been wanting in the past, but had been patched up. The breach of 1054 was final, and thereafter grew wider. All attempts to reunite the Eastern and Western Churches failed. After the separation of the Church, its Canon law became divided into Canon law of the Eastern Greek Church and Canon law of the Western Latin Church. The result of this separation of the Church into the Eastern and Western Churches was that, while until the 10th nearly and theoretically until the middle of the 11th century of this era there was a Canon law common in the main to both East and West (particularly as to the purely ecclesiastical side of the Canon law and in some measure as to the civil side of the Canon law), after the separation the collections of the law vary and are not recognised other than in West or the East, as the Church may be Roman or Greek. Furthermore the Greek Church adapted must of its later civil Canon

laws from the 9th century Basilica of the Emperor Basil and later abridgments,[3] and the influence of Roman law in this Byzantine or Greek form, not in the form left by Justinian, was carried into northeastern and southeastern Europe; while the Latin Church adapted its civil canon laws from the Corpus Juris of Justinian,[4] and thus carried into Western Europe Roman law in its Latin form of the 6th Century, as published by Justinian.

Source of the Canon law of the Western Roman Church at and since the 12th century. Before proceeding to consider how the medieval Canon law of the Roman Church was codified in the Corpus Juris Canoncici, it will be quite beneficial to make a resume of the sources of that law. The sources of the Western Roman Canon law at the 12th century and thereafter are these six: (1) Holy Scripture; (2) usage and tradition; (3) the opinions of the early Church fathers; (4) the statutes of Councils; (5) the decrees of popes and bishops; (6) the civil laws of sovereign states and the Concordats.

All of these sources except the second (usage and tradition) constituted the written law of the Roman church, and other churches sprung therefrom so far as these Protestant churches recognize such law. Usage and tradition constituted the unwritten law. This ecclesiastical common or customary law is known by Canonists as the " jus commune "—the law " that is common to the Universal Church, as opposed to the constitutions or special customs or privileges of any provincial church."[5] Curiously enough, this very term " Common law " of the Canonists was borrowed in the 13th century by the English temporal lawyers[6] at a time when there was but little enacted law in England, and now denotes the unwritten law of England and America, in a peculiar sense.

[3] See Sherman, *Id.*, vol. i, ss. 176-182.
[4] See Sherman, *Id.*, vol. i, ss. 135-140.
[5] Maitland, *Canon law in England*, p. 4.
[6] Sherman, *Roman law in the modern world*, vol. i, s. 371.

The 12th to 16th century Corpus Juris Canonici. Necessity felt in the 12th century for a codification of the medieval Canon law of the Roman Church. The Bologna revival of Roman law which began in the 12th century soon had a great influence on Canon law. The great simplicity, small bulk and certainty of the Imperial codification of Justinian contrasted most favorably with the enormous bulk, prolixity, redundancy and confusion of the law of the Church then 12 centuries old and yearly growing more bulky and confused.

By the 10th century the collections of Canon law of the Latin Church had become so numerous that collections in the nature of partial codifications, compiling and revising previous collections, appeared. From the 10th century down to Gratian's Decretum—about 250 years—36 collections of this nature appeared, five of which were very helpful to Gratian while making his Decree. The way to improve Canon law was to completely codify it: finally, this was seen by Canonists, and the result was the Corpus Juris Canonici—a genuine code of law, although ecclesiastical, and the first since Justinian.

Date, nature, and description of the Corpus Juris Canonici. The ensemble or collective title of the medieval codification of the Canon law of the Western Roman Church is the "Corpus Juris Canonici,"—a title of 16th century origin given to this codification in contradistinction to the Corpus Juris Civilis or Justinian's 6th century codification of the Roman Civil law.[7] The latest and best edition of the Corpus Juris Canonici is that of Richter in two volumes, Leipsig, 1879-1881.[8]

The Corpus Juris Canonici, unlike the codification of Justinian, was not codified within the lifetime of

[7] Sherman, *Roman law in the modern world*, vol. i, ss. 226, 135.

[8] It has not, however, superseded Boehmer's 2 vol. work (Halle, 1747) which is very valuable for his notes and copious indices. It contains much supplementary matter including the *Liber Septimus* and *Lancelot's Institutes*.

any one person. The work of compiling the Corpus Juris Canonici extended over several centuries: the first part, Gratian's Decree, appeared about the middle of the 12th century, in 1140; while the latest Papal Decretals of the second part of the Corpus Juris Canonici stop near the close of the 15th century, in 1483. The two volumes or parts of the Corpus Juris Canonici will now be considered separately in detail.

The 12th century Gratian's Decree (Decretum): the first part or volume of the Corpus Juris Canonici, and published in 1140. In the renowned city of Bologna, Italy, some thirty or forty years before the publication of the Decretum, a famous law teacher by the name of Irnerius had founded a school for the study of Roman law from the pure sources of that law, thus introducing scientific cultivation of the Civil law.[9] In this city of Bologna was a monastery known as St. Felix, belonging to the Camaldulensian monks, one of whom desired to emulate Irnerius and introduce the scientific cultivation of Canon law: this monk was the celebrated Gratian. Until Gratian's time, Canon law has been regarded as a branch of theology, and was studied at ecclesiastical seminaries attached to cathedrals or monasteries.

The Decretum of Gratian was published in imitation of the Roman Digest of Justinian,[10] it preserves in the arrangement of a Digest the works of earlier writers, compilers, and authorities on Canon law revised to the date of its publication in 1140,—all obsolete matter being disregarded. Maitland thus very aptly characterizes the Decree: "To start with, it was a mere private work, one among rival text books . . . nevertheless it soon drove all competitors from the field. It became the one and only book out of which students learnt the old law of the Church, and to

[9] Sherman, *Roman law in the modern world*, vol. i, ss. 211, 213.
[10] Sherman, *Id.*, vol. i, s. 228. The mode of citing the Decretum is stated in the footnotes of the preceding reference.

which practitioners turned, if, as would happen from time to time, compelled to refer to the old law.'"[11]

The publication of Gratian's Decretum gave an enormous influence to the study of Canon law at the University of Bologna. The church law was put upon a parity, at least theoretically, with the Roman Civil law. Students at Bologna were divided into canonists or legists, sometimes also called decretistae and civilistae. The original authorities were studied orally. Soon, as in the faculty of the Roman Civil law, explanatory notes (glossae) were added by professors, who wrote these on their copies of the text, either on the margin or between the lines.[12] There was much friendly rivalry between the two faculties of law at Bologna, and Doctors of Canon law were graduated along with Doctors of Civil law. After a while a new degree, the now very familiar Doctor Utriusque Juris (Doctor of both laws, i.e., of the Roman Civil and the Canon law), was invented. Outside of Bologna perhaps the University of Paris exercised the greatest influence on the study and application of Canon law.

Illustrative passages translated from Gratian's Decretum. The following excerpts from the Decretum illustrate its nature and scope.

Part 1, *Distinctio* 1. "The human race is ruled in two ways, by natural law and customs. The law of nature is that which is contained in the laws of the gospels, whereby every one is ordered to do to another that which he wishes to be done to himself, and is prohibited from doing to another that which he is unwilling to have done to him. Whence, as Christ says in the Gospel, [13] 'All things whatsoever you wish men to do to you, do ye also the same to them. This is the law and the prophets.' Hence Isidor in the fifth book of his Etymologies says: "*Canon* 1, "All law is either divine or human. Divine law is found in the nature of things, human law is established in customs, and consequently these differ, since some are acceptable to some races, others to others" . . . (*Gratian's* note: "From the words of this authority it is evidently to be ascertained how divine and human law differ from each other" . . .) 81, "Now the term law (jus) is a general term of many kinds."

[11] *Canon law in England*, p. 3.
[12] See Sherman, *Roman law in the modern world*, vol. i, s. 210.
[13] St. Matthew, vii., 12.

Canon 2, "Again in the same book of Etymologies Isidor says: Law (jus) is a general term: a statute (lex) is a species of law. Law (jus) is so-called, because it is just (justum). Now all law is made up of statutes and customs." *Canon* 3, "What is a statute? A statute is a written law." *Canon* 4, "What is custom? Custom is long continued usage, practice of customs for a long time." *Canon* 5, "Custom is a certain kind of law made up of usages, which are regarded as the law, when there is no statute on the subject." (Gratian's note: "There is another division of the law, as witness Isidor saying in the same book:" *Canon* 6, "Law is natural, civil, or of the jus gentium."). *Canons* 7, 8 *and* 9 define these above three kinds of law, and read just as if copied verbatim from the Roman Civil law of Justinian's Corpus Juris.

Part 1, *Distinctio* 3, defines the term "canon" and "rule," which according to Isidor are synonymous, the former being a Greek word, the latter (rule,-regula) a Latin word. *Canon* 4, "Every law either permits something to be done, or . . . forbids something to be done . . . or punishes the commission of an act."

Part 1, *Distinctio* 4, *Canon* 1, "Why are laws made. Now laws are made in order that by fear of these the audacity of mankind may be restrained, and that innocence be safe among wicked men, and that the power to do injury of the wicked be bridled by the terror of punishment." *Canon* 2, "What ought a law to be. Now a law should be honest, just, for possible cases according to the nature of things, in accordance with the custom of the country, suitable for the time and place, necessary, useful, clear, and containing no ambiguity, passed not solely for the private interest of anyone, but for the common welfare of all the people of the State."

Part 2, *quæstio* 5, *Canon* 6, "Let no one marry without a public ceremony," reads in part: "Also from the Council of Arles; "let no marriage take place without a dowry, unless such is impossible, nor let no one presume to wed or take a wife without a public ceremony.'" *Canon* 7, "Why women are veiled when they marry. Women, while they are being united in marriage, are veiled for this reason, that they should understand that they must always be obedient and humble to their husbands. . . . Also a ring is at the outset given by the groom to the bride; this is done as a token of their mutual affection, and because at one stroke two hearts are thereby joined. That it is placed over the fourth finger is because in this finger, there is a vein, it is said, which goes straight back to the heart."

The Papal Decretals of the 13th, 14th, and 15th centuries the second part or volume of the Corpus Juris Canonici, and published 1234-1483. The Decretals were published in imitation of the Imperial Code and Novels of Justinian,[14] which consist only of statutes. The Decretals are the statutes of the Popes who,

[14] Sherman, *Roman law in the modern world*, vol. i, s. 228, the footnotes of which also give the mode of citing the Decretals.

vested with supreme authority over the church in the West, legislated for it for the whole world. From the manner of their creation the Decretals bear a close analogy to the constitutions or statutes of the Roman Emperors in the period of open absolution following Diocletian. The Roman Emperor did not then legislate with the counsel of the Senate; neither did the Roman pontiff on the Tiber 1000 years later consult his Cardinals when writing a Decretal. Furthermore "a Decretal is by no means," as Maitland says,[15] "always a decision of a concrete case; often it is an abstract answer to an abstract question. Curiously enough, the English bishops seem to have been peculiarly fond of submitting such questions to the Popes."

The Decretals consist of five distinct compilations: (1) the Five Books of Decretals of Gregory IX; (2) the Sixth Book of Decretals of Boniface VIII; (3) the Clementine Constitutions of Clement V.; (4) the Decretals of John XXII; (5) other decretals from the time of Boniface VIII to Sixtus IV.

(1.) *The 13th century. Five Books of Decretals of Gregory IX,—sometimes called the "Five Decretals" or the "Liber Extra."* (*Quinque Libri Decretalium Gregorii Nomi, A.D. 1234.*) The Decretals of Gregory form a parallel with the Imperial Code of Justinian's Corpus Juris, and were published in imitation thereof. The last title of Gregory's Decretals betrays its origin from the Digest of Justinian: both the last title of the Liber Extra and the next to the last title of the Roman Digest[16] bear the same rubric "*De verborum significatione,*" and the body of the Canon law title repeats to a large extent the subject matter of the Roman law title.

(2.) *The 13th century Sixth Book of Decretals of Boniface VIII,—sometimes called the "Sixth De-*

[15] *Canon law in England*, p. 124.
[16] Dig. 50, 16.

cretal," or *"Liber sextus,"* or the *"Sext."* (*Liber Sextus Decretalium, A.D. 1298*). It supplements Gregory's Decretals, bringing the Decretals down to date. But it differs from Gregory's work thus: instead of a case being stated with the Papal decision thereon, abstract rules of law are laid down, probably from actual judgments. The last two titles of the Liber Sextus were evidently borrowed from the last two titles of the last book of the Digest of Justinian. The titles are the same in both works: *"De verborum significatione"* and *"De regulis juris."* Included under the latter title of Boniface's Decretals are 88 secular legal maxims or precepts chiefly borrowed —and sometimes verbatim—from the Roman digest of Justinian: these, it is said, were the work of Pope Boniface himself, and it is claimed that they were added to procure the acceptance of the Liber Sextus among the Civilians (legistae) of Bologna University.

(3.) *The 14th century Clementine Constitutions, —sometimes called the "Clementines," or the "Clementinae," or the "Liber Septimus," or the "Sept."* (*Clementis Papae Constitutiones, A.D. 1313.*) The Clementines, the additional or later Papal statutes, continue in analogy to the Novels of Justinian:[17] they are more properly called "Constitutions" rather that "Decretals." But the meaning of both words is the same in practice,—namely "statutes" of the Popes.

(4-5.) *The 14th century Decretals of John XXII (Extravagantes Johannis XXII, A.D. 1340), and the 14th and 15th centuries Decretals of Popes from Boniface VIII to Sixtus IV. (Extravagantes communes A. D. 1483).* These additional decretals (Latin "extravagantes" means literally "wandering") were added to the Corpus Juris Canonici by private and not by official authority. The Extravagantes were also

[17] See Lancelot's Preface to his *Institutes.*

published in imitation of Justinian's Imperial Novels.[18]

Illustrative passages from the Papal Decretals. The following excerpts illustrate the nature and scope of the Papal Decretals.

Decretals of Gregory IX, Book 4, 17 (" *qui filii sint legitimi* "), *Chapter* 6, " The same (Pope Alexander III, who reigned 1159-1181) to the Bishop of Exeter (England). So great is the force of marriage, that those children who were born before the marriage are considered as legitimate after a marriage has been contracted between the parents. But if a man, while his wife is living, have relations with another woman and have children by her, although after the death of his wife he marry this woman, nevertheless his son is spurious, and cannot inherit from him." Chapter 5 is addressed to the Bishop of Exeter and the English Abbot of Herford, while Chapter 7 is addressed to the Bishop of London,—instances of the direct connection of the medieval English clergy with the Canon law of the Western Church of Rome in the closing years of the 12th century.

Decretals of Gregory IX, Book 4, *Title* 3 (" *de sponsa duorum* "), *Chapter* 4, " Alexander III to the Bishop of Geneva. You, my brother, have asked us what you ought to do about those persons who having become betrothed to women, after a time, before they marry or have relations with them, wed women other than these. In regard to this question we thus hold, my brother, that if a man and a woman engage themselves by exchanging express promises de praesenti, neither of them, in the lifetime of the other party, can take upon himself or herself any other vows, even if he or she might proceed to a monastery. But if between them there was not an express promise de praesenti, but a promise de futuro, just as if either of them said to the other, 'I will take you to be my wife or husband,' if another shall have wed the woman, even if between the first parties there should be a promise on oath, as we have said, de futuro, this marriage cannot be on this ground (of not fulfilling the betrothal agreement), but penance should be inflicted on them for the violation of faith."

Liber Sextus Decretalium, Book 1, *Title* 19 (" *de procuratoribus*), *Chapter* 5, " Boniface VIII: He who is appointed a general agent for the transaction of business can thereby sue and be sued." *Liber Sextus, Book* 5, *Title* 12 (" *de regulæ juris* "), " Boniface VIII: A mala fide possessor cannot acquire title by prescription by any lapse of time." Without possession prescription cannot proceed." " No one can be obligated to perform an impossibility." " A personal privilege follows the person and is extinguished with the person itself." " Ratification is retroactive and is without doubt equivalent to a commission of agency." " In obscure statements the least obscurity is to be followed." " He who is first in time is stronger in right (Qui prior est tempore potior est jure)." " Any-

[18] See Lancelot, *Id.*

one may do through another what he himself can do." "What one does through another is just as if he had himself done it (Qui facit per alium est perinde ac si faciat per se ipsum)." "No one can transfer a greater right to another than he himself has."

Clementine Constitutions, Book 5, *Title* 4 ("*de homicidio voluntario vel casuali*"), *Chapter* 1, "Clement V in the Council of Vienna. If a madman, or a child, or a somnambulist mutilates or kills a man, he incurs no liability therefrom. And the same we decree as to him, who, not otherwise being able to avoid death, kills or mutilates one invading his abode."

Extravagantes John XXII, Book 1, *Title* 8 ("*de majoritate et obedientia*"), *Chapter* 1, "Boniface VIII. All faithful disciples of Christ of the necessity of their safety are under the power of the Roman Pontiff, who has both swords, who is judge over all and is judged by no one. This constitution subjects the King of France and his people to the Roman church just as formerly, as see infra concerning our privileges Chapter 'Meruit."

The 16th century Institutes of Canon Law, published by Lancelot in 1563. The famous Italian Canonist Lancelotti relates in his preface to his Institutes of Canon law that he wrote his book in imitation of the Imperial Institutes of Justinian and to complete the parallel between the Roman Corpus Juris Civilis and the ecclesiastical Corpus Juris Canonici. Lancelot's Institutes do not appear in the modern editions of the Corpus Juris Canonici, but are to be found in the older editions of this medieval compilation of Canon law.[19]

Comparison of the Corpus Juris Canonici with the Corpus Juris Civilis: their similarities and differences. The Corpus Juris Canonici is the eldest daughter of the Corpus Juris Civilis of the Roman Emperor Justinian. The Corpus Juris Civilis was used to create the Corpus Juris Canonici. The great problems of law and jurisprudence were thought out once for all by the Roman lawyers, and their labours are recorded in the Corpus Juris Civilis; the Canonists embodied many of their solutions literally or indirectly in the Corpus Juris Canonici, and with them saved civilization in Europe until Europe was ready to go to the pure fountains of the Roman law.

[19] As to the mode of citing Lancelot's Institutes, see Sherman, *Roman law in the modern world*, vol. i, s. 228, footnotes.

Canon law was the filter through which Roman law passed into many European countries, like England, not having a direct inheritance from Roman Jurisprudence: for wherever the Church went, its law —borrowed to a large extent from that of Imperial Rome—went with it. Without a formal acknowledgment of its derivation, Roman law in a clerical dress, garnished with many arbitrary ecclesiastical regulations and innumerable rules for religious conduct and practice, was admitted to the acquaintance of the civil law of the countries of Europe with all the latter law's crudeness and barbarities. The Corpus Juris Civilis excels the Corpus Juris Canonici in that the former is exclusively a master system of creative jurisprudence, while the latter is chiefly a masterly system of imitative jurisprudence (so far as the civil side of Canon law is concerned). As a weapon of ecclesiasticism, the equal of the Corpus Juris Canonici has never been seen.

Medieval Roman Canon law was absorbed in no small measure throughout Europe. The influence of the medieval Roman Canon law on Europe has been markedly shown along three great juridicial highways: criminal law, constitutional law, international law; while along the highway of civil law the influence of medieval Roman Canon law has been experienced in many activities of civil law, the scope of that influence being determined for each country of Europe as it worked out its history.

(1.) *Criminal law.* The Church was very active in criminal law: it punished both ecclesiastical and religious offences (such as heresy, simony, blasphemy) and violations of personal and social morality (such as adultery, bigamy, fraud, perjury). To administer this extensive judicial system the Church had to formulate and enact her own procedure, which was generallly far superior to that prevailing in civil courts in medieval Europe. Furthermore, the administration of the law throughout Europe in early

medieval times had fallen into the hands of the clergy, many of whom had been trained in the law schools of Bologna and Paris; all of which was highly beneficial to Europe at this time. The criminal law of the Teutonic peoples set forth in their codes was imperfect, unsettled, generally a system of fines and money penalties arranged to fit the rank of the criminal or his victim. Evidence was unknown or sleeping the sleep of infancy. Innocence was proven and protected by the ordeal, judicial combat, compurgations. Hence the common people were glad, for centuries, to take refuge in the ecclesiastical courts, and to escape from the fines and exactions of feudal courts inflicted principally to profit the overlord.

(2.) *Constitutional law.* The rising European States modeled their administration upon that of the Church,—the most perfect and strongest of known models. The Church boldly asserted the constitutional duties of a sovereign. It declared to Kings that they were responsible to God, and should they neglect their duties, their subjects could be absolved from their allegiance. Curiously enough in after times the enemies of the Church borrowed many effective weapons from her arsenal. The doctrinaires who preached the law of Nature and of Nations and who fought ecclesiastical encroachments, adopted many principles found in the Corpus Juris Canonici. To the Corpus Juris Canonici may also be traced the germs of the leading doctrines of the French Revolution of 1789.[20]

(3.) *International law.* It seems as if the Church may be said to have originally made international law. It inculcated the idea of the brotherhood of man, as opposed to the Roman idea in ancient times of regarding all foreigners as hostes. The Papal Court was the international tribunal of the Middle Ages.[21] The Popes protected the weak against the strong, and right

[20] Sherman, *Roman law in the modern world*, vol. 1, s. 253.
[21] See *The Papacy as an international power*, 41 Am. Law Review, Sept.-Oct., 1907.

against might. Princes were halted in their tyranny by Papal interference.

(4.) *Civil law.* The common law of Europe has derived much of its Roman law element through the descent of that law into it via the channel of Canon law. There should be no failure to ignore this obligation which modern law owes to Canon law, in paying our debt to the ancient sources alone of the Roman law. The Canon law took out what was best in existing systems, and transformed it into a homogeneous whole. Particularly in the topics of succession, marriage, guardianship, and relation of parent and child is the influence of Canon law to be experienced.

The present ecclesiastical authority of medieval Roman Canon law. The Roman Canon law declined with the power of the Church; as the Roman Church weakened, so did its law. Consequently the Corpus Juris Canonici to-day, from the civil viewpoint of ecclesiastical jurisprudence, possesses scarcely more than an historical or scientific interest. From the purely ecclesiastical viewpoint, from the viewpoint of church discipline and ecclesiastical management, from the viewpoint of theology the Corpus Juris Canonici was, until the year 1918, still the recognized standard of conduct for the modern Roman Catholic Church, except in so far as it had been derogated from or altered by modern Roman Catholic law. This modern Roman Catholic Canon Law commences with the deliberations of the Council of Trent, 1545 (which defined the status and position of the Catholic Church, theologically speaking, after it was attacked by the Protestant Reformers), and extends to the present time.

But the Canon law commencing with the Council of Trent originally never bound any save Catholics, and was in great measure disregarded by Protestants. After the 16th century the external influence of Roman Catholic Canon law on Europe has been trifling, as

compared to that influence during the previous four centuries.

The year 1918 witnessed the going into effect of an entirely new Code of modern Roman Canon law, which codification bridges the centuries between the 16th and the 20th, and preserves whatever is not obsolete in the medieval Corpus Judis Canonici.[22] To Pope Pius X is due the glory of initiating the work of codification, which began in the year 1904 and continued for thirteen years. The main burden of this gigantic task was borne by the present Cardinal Gasparri, Secretary of State under the succeeding Pope Benedict XV who promulgated the new Codex Juris Canonici.

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[22] See supra first page of this article.

CANADIAN BAR ASSOCIATION.

We take great pleasure in presenting some of the valuable reports and a list of the formidable personnel of this body. The criticism we have to offer is not that usually levelled at the profession, namely, that it is gifted with prolixity. The truth is our lawyers who, among them, know all the too much and too little of our laws and all the creaking hinges in their administration are tongue-tied. The fear of seeming to advertise prevents them from individual protests and it is only when in convention that they take courage to erupt. They owe it to the public to erupt oftener and continuously and so long as there are faults to be remedied. It does the profession no service to allow the public to keep saying "these fellows know that the law is not as it should be; but they keep it under their hat." So we serve notice on each of these representative lawyers that the Press in general is a medium of redress and that this periodical in particular will best justify its existence by sharing in struggles for the amendment of our laws.

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M. H. Ludwig, K.C., R. J. Maclennan, Toronto; E. Fabre Surveyer, K.C., Montreal; R. W. Craig, K.C., Winnipeg.

COMMITTEE ON LEGAL EDUCATION

REPORT ON LEGAL EDUCATION IN THE COMMON LAW PROVINCES.

(Adopted at Fourth Annual Meeting).

In connection with this important subject your Committee has taken into consideration the existing law and practice in the several provinces, and submits a scheme which it trusts may be found suitable for general adoption. Its features are:

1. To adhere in the main to the existing system which is essentially the same throughout Canada;
2. To remove unessential differences;
3. To leave to the several provinces a wide discretion in matters of detail.

The subject is dealt with under the four heads of:

(1) Admission to Study;
(2) Period and Course of Study;
(3) Transfer of Students;
(4) Admission to Practice.

(1) ADMISSION TO STUDY.

Your Committee recommends that every candidate for admission to study be required to have passed an examination at least equivalent to the standard attained by a student at the end of the first year of the course leading to the degree of B.A., at an approved University.

No student to be admitted to study who has not attained the full age of 18 years.

(2) PERIOD AND COURSE OF STUDY.

Your Committee recommends that the course of study shall consist in attendance at the office of a practising barrister, or under indentures at the office of a practising solicitor, for a period of five years, provided that attendance as aforesaid for a period of three years shall be sufficient in the case of students who, at the time of their admission to study, are graduates of an approved University; provided further that the obligation of office attendance shall be suspended during the period of the year in which a student is duly following a course of study at an approved law school.

An approved University and an approved Law School mean respectively a University and a Law School, or the Law Faculty of a University, approved for the purpose by the Council of the Canadian Bar Association.

(3) TRANSFER OF STUDENTS.

In order to provide for the case of students who may desire to continue their course of study in a province other than that in which they have been admitted to study, your Committee recommends that in computing the period of study in any province, credit shall be given for previous office and law school attendance in any other province or provinces, if the requirements in respect thereof

are substantially equivalent to the requirements in respect of office and law school attendance in the province in which any such student desires to continue his course of study.

(4) ADMISSION TO PRACTICE.

Your Committee recommends that the examination to be passed by students before admission to practice remain as heretofore under the direction and control of the constituted authority in each province. It is suggested, however, that the provincial authorities be invited to co-operate with this Association with a view to securing a reasonable degree of uniformity, and effecting other improvements in the examinations and in the prescribed courses of study.

Your Committee further recommends that a Sub-Committee be appointed to prepare and submit a standard curriculum for adoption by the various Law Schools in the Common Law provinces, and that in such curriculum increased attention should be paid to the training of the students in legal ethics and public speaking.

Your Committee further recommends that a sub-committee be appointed to consider and bring in a report on the method of teaching in law schools.

COMMENT ON THE DRAFT REPORT

By DR. R. W. LEE,

Chairman of the Committee.

This report is a re-modelled version of the report of the late Committee on Legal Education and Ethics which was presented at the Montreal meeting. It is hoped that it may prove generally acceptable. In addition to the features referred to in the body of the report, the following points may be referred to:—

(1) *Limitation of the report to the Common Law provinces.*—This was introduced at the instance of the Montreal members of the Committee, who felt that they were not sufficiently representative of the various elements in the province, and therefore preferred to refrain from making any recommendation.

(2) *Admission to Study.*—The Committee adheres to the idea that a student should not be admitted before he reaches the age of 18. It is objected that a boy may leave High School at 16; what is he to do in the meantime? The answer is obvious. Put in his time in the Arts Faculty of a University or in some remunerative employment. He is too young to study law.

(3) *Period and Course of Study.*—The Committee accepts the principle of office attendance during the whole course, but with the qualification that students need not go to the office while actually attending the Law School. In accordance with existing practice the period of study is reduced in favour of graduates.

(4) *Transfer of Students.*—The principle of free transfer is admitted. The Committee recommends that credit be given in any province for previous extra-provincial studies, but does not determine the amount of credit. This is left to the discretion of the province to which the student seeks to transfer.

(5) *Uniformity of Curriculum.*—This subject should be taken in hand without delay by a small sub-committee.

REPORT OF THE COMMITTEE ON ADMINISTRATION OF JUSTICE

(Adopted at Fourth Annual Meeting of the Association at Winnipeg).

1. THE JUDICIARY.

The Committee begs to report that, since the adoption of its report as amended at the annual meeting in 1918, action has been taken by the Dominion respecting the salaries of Judges of County and District Courts.

The amount aimed at in that report was $6,000.00 and the result of the legislation referred to is a straight salary of $4,000.00. It is illogical that, with the present high cost of living and the wave of increased remuneration for salaries in commercial and other lines, there should be any hesitation to give the judges the minimum asked for—$6,000.00.

Your Committee regrets to have to report that the general principle that the salaries of Judges of Supreme Courts should be increased has not been recognized and that, with the exception of an attempt at partial adjustment as between trial and appellate judges, no action has been taken.

It is respectfully suggested that the Association be asked to reaffirm the salaries set forth in Clause 9 of the report submitted at the annual meeting in 1918, except that it is recommended that there should be no distinction between the judges of the Appellate Courts and those of the Superior Courts and that the minimum for each of such judges be $10,000.00, and that all duties asisgned to the Judiciary either by the Dominion or Provincial Governments be performed without fees; that the practice of appointing the judges as commissioners and arbitrators be discontinued.

Your Committee further regrets that the established principle of leaving judges' salaries exempt from taxation is being infringed upon, and recommends that a communication be addressed to the Honourable the Minister of Justice that the Statutes be amended by striking out Section 13 of the 1919 Amendment to the Judges' Act and leaving sub-section 3 of section 27 of Chapter 138, R.S.C. 1906, as it originally stood.

Your Committee feel that the proposed legislation requiring judges to make a statutory declaration before receiving their salaries is a reflection upon the Bench and your Committee recommends that a protest be sent to the Honourable the Minister of Justice.

2. TARIFFS AND FEES FOR SERVICES IN THE PROFESSION GENERALLY.

While certain of the Provinces have recognized the necessity of an increased tariff of fees and have affected increases to the extent of about 50%, your Committee regrets that in other Provinces the authorities have not yet done so. Your Committee would recommend that this Association give this matter its fullest support in Provinces where an adequate increase has not been made.

3. MARRIAGE CONTRACTS AND DIVORCE.

There has been considerable controversy on the subject of transferring the jurisdiction in divorce and marriage contracts from the Dominion Parliament to the Provincial Courts and W. F. Nickle, Esq., K.C., M.P., introduced legislation with that object in view—a copy of which is attached to this report—but your Committee deals with the question of principle and strongly advocates that paragraph 7 of the 1918 Report be re-affirmed and that the Association pledges itself to support any legislation making uniform the grounds on which marriage can be annulled or contracting parties divorced and transferring jurisdiction in such matters to the Superior Courts of each Province, excepting operation of the Act from the Province of Quebec until that Province by an Act puts into force the Dominion legislation suggested.

Your Committee further recommends that a Committee be appointed to watch and deal with any legislation that may be introduced in the Dominion House on the question of divorce. (It was the decision of the Association that the Committee on Administration of Justice should constitute the Committee to carry out the above work.)

4. REPORTS.

Your Committee recommends that the President be requested to appoint a special committee of this Association to correspond with the respective law societies and provincial associations in Canada to consider the matter of reporting and the practicability of the reporting of cases for all Canada, so as to prevent duplicating and overlapping of reports and to reduce the expense thereof, and that the Committee report its conclusions and recommendations to the Council of the Association, the Council to bring in a report before the next annual meeting of this Association.

Your Committee is strongly of the opinion that the present system of reports is highly unsatisfactory and creates undue burden on the profession.

5. SUPREME COURT.

Your committee recommends that this Association urge that two days should elapse between the completion of the hearing of the last case in any Province, and the calling of the first case from the Province next in order on the list.

6. CAPITAL PUNISHMENT.

There is at the present time pending before the House of Commons legislation providing for the carrying out of capital sentences at some central point or points where proper accommodation, protection and equipment can be furnished, and your Committee recommends that such legislation be endorsed.

7. COMMITTEES.

This Committee suggests, for more effective work, the first work taken up by the Annual Meeting should be the election of Officers

and Committees and that each Committee should be organized during the Annual Meeting; that each Committee should have an executive committee of three responsible for the work of the Committee, as distance makes it impossible to hold meetings and the labour of preparing reports usually devolves upon the Convener without having the views of all the members of the Committee.

(From Report of Committee on Administration of Justice Adopted at Third Annual Meeting at Montreal, September, 1918.

9. SALARIES OF THE JUDICIARY.

The minimum salaries to the respective members of the Judiciary should be as follows:—

(a) SUPREME COURT OF CANADA—
Chief Justice $15,000
Justice 12,000

(b) EXECHEQUER COURT OF CANADA—
Chief Justice $10,000
Asst. Justice 8,000

(c) APPELLATE COURTS—
Chief Justice $12,000
Justices 10,000

(d) SUPREME OR SUPERIOR COURTS—
Chief Justice $10,000
Justices 9,000

(e) COUNTY AND DISTRICT COURTS—
All Judges .....$ 6,000

Resolution of the Association passed at the FOURTH ANNUAL MEETING in WINNIPEG, AUGUST, 1919:—

Moved by MR. J. B. COYNE, K.C.,

Seconded by MR. A. C. CAMPBELL:

THAT this Association re-affirms the resolution of last year in regard to the salaries of Judges; with the amendment that the salaries of the Chief Justice of the Supreme Court of Canada be $16,000 a year and of the Justices of that Court $15,000 and also that schedule suggested for the Appellate Courts (c) be adopted also for the Supreme or Superior Courts (d).

Text of Resolution passed at Fourth Annual Meeting, Winnipeg, 1919:—

Moved by MR. TRAVERS SWEATMAN,

Seconded by MR. E. K. WILLIAMS:

That a Committee be appointed to take up the whole question of the salaries of Judges with Parliament, and, if possible, wait upon the proper authorities with reference to it; the President of the Association to name the Committee.

WHERE THE LOWER COURT OVERRULES THE HIGHER.

It is not often that a lower court feels called upon to overrule the decision of the next higher court. *Rex* v. *Gartshore,* decided in the Supreme Court of British Columbia by Hunter, C.J., on October 24th last, has that effect. The decision is interesting as an analysis of the authorities and is as follows:—

This is an application for a writ of habeas corpus directed to the jailer of Okalla Prison and to show cause why the applicant should not be discharged from custody.

The defendant had been convicted by a police magistrate for the unlawful sale of intoxicating liquor in violation of section 10 of the Prohibition Act, 1916, and sentenced to six months' imprisonment.

The hearing before the magistrate was concluded on January 22nd, 1919, and sentence was pronounced on January 30th, and the warrant committing the defendant to prison was issued on the same day. He was was not, however, lodged in prison pursuant to the warrant, being admitted to bail pending the hearing of a case stated by the magistrate under the provisions of the Summary Convictions Act, 1915, for the opinion of the Supreme Court on (inter alia) the sufficiency of the evidence to warrant the conviction. The case was heard by me on the 7th of February, and, after hearing the argument on behalf of the Crown and the accused, I came to the conclusion that, assuming that the defendant had agreed to sell the liquor in question, there was no evidence to show that he had actually carried it out, whereupon I set aside the conviction.

The Crown took an appeal from my order to the Court of Appeal, and that court, having heard argument and reserved judgment, on May 20th, 1919, set aside my order and affirmed the conviction, stating it to have been made on the 4th of January, 1919, which, of course, was erroneous, as it took place on January 30th.

The case is not yet reported in the official Law Reports, but I have been furnished with copies of the judgments by the official reporter.

It appears that the defendant's counsel at the hearing of the appeal challenged the jurisdiction of the court to entertain an appeal and wished to reopen the question which was supposed to have been settled by a former decision of the court in *Rex* v. *Evans,* 23 B.C.R., 128.

The court (Martin and McPhillips, JJ.A., dissenting), decided to hear the argument and then reaffirmed the existence of the right of appeal. It does not appear that Mr. Justice Eberts assented to this decision, but it is clear that the other four judges maintained the right of appeal. They then dealt with the appeal on the merits, and decided (McPhillips and Eberts, JJ.A., dissenting) to reverse my order. Two of the three judges who reversed

my order did not give any reasons for holding that I was wrong. The third, Martin, J.A., did give reasons, but, as it is reasonable to assume in a case concerning the liberty of the subject, that the majority consulted before reversing my order, the inference is that the other two judges were not prepared to adopt the reasons given by Martin, J.A., or they would have said so. On the other hand, Mr. Justice McPhillips gave reasons in his oral judgment, stating that he entirely agreed with me. In fact, I do not see how the matter could be put any more clearly than it was when he said:

"The mere finding of the articles on the premises, without more, constitutes very insufficient evidence of the completed sale. There must be something definite to enable it to be said that the defendant placed those articles there. It may not need to be very cogent evidence, but there would need to be some evidence; for instance, that the carter got his instructions for delivery from the defendant, or some evidence connecting the defendant with the selection, appropriation and delivery, but all such evidence is absent."

The result, then, of the appeal was unfavorable to the defendant by a majority of one, and he was then taken into custody under the warrant which the magistrate had issued, no fresh warrant having been issued, and taken to the Okalla Gaol to serve out the sentence, and now applies for his discharge.

The argument came on to be heard by me on October 15th and 16th, Mr. Johnson, Deputy Attorney-General, appearing for the Crown, and Mr. Wilson and Mr. Davis for the applicant, but inasmuch as the matter presented for my consideration appeared to be of some gravity, I reserved judgment, and in the meantime admitted the defendant to bail, the Crown assenting to that course.

The application for habeas corpus and for the prisoner's discharge is based on several grounds. One is that the order of the Court of Appeal purported to affirm the conviction alleged to have taken place on the 4th of January, 1919, whereas the conviction in question took place on the 30th of January and not on the 4th, and therefore was not affected by the order of the Court of Appeal. As to this objection, however, while it is true that one paragraph of the judgment purports to affirm a mythical conviction, another paragraph purports to set aside my order of the 7th of February, so that assuming the court had jurisdiction to entertain the appeal, the order, in my opinion, would nevertheless have effectually disposed of the matter adversely to the defendant.

A number of objections were also taken to the legality of the warrant under which the defendant was taken into custody, but, as, upon a full examination into these points, it might be found that the net result would be that a fresh warrant could lawfully be issued by the magistrate, a discharge based on any such objection might turn out to be illusory, in which case the court would then no doubt be confronted with the necessity of passing on the main question, which has been raised, and which is that the Court of Appeal had no jurisdiction to entertain an appeal, and if that is the case the prisoner has been unlawfully imprisoned.

Now, of course, a judge when called on to say that an order of a higher court is void ought to consider the matter carefully before taking that course. I at first thought that it might be pos-

sible for the defendant to take an appeal to the Supreme Court of Canada, but I find that the door of that court has been closed by its decision in *Re McNutt*, 47 S.C.R. 259, in which it was held by a majority of the court that no appeal lies to that court in a case of this kind. It would also be open to the defendant to bring an action for false imprisonment, and in that way have the validity of the action of the Court of Appeal passed on by the Supreme Court of Canada, but in the meantime he would have to serve out the alleged unlawful sentence, and any damages which he might recover would be a very inadequate remedy, and in any event the object of the habeas corpus proceedings, which is to obtain speedy relief from unlawful imprisonment, would be frustrated by such delay. I think, therefore, that I am bound to consider the point and give my opinion on it.

In order that the nature of the question may be easily understood it is first of all necessary to set forth the legislation concerning the matter.

By the Court of Appeal Act, being Chapter 51 of the Revised Statutes, 1911, section 6, sub-section 4 (a) it was provided that an appeal should lie to the Court of Appeal from the decision of the Supreme Court or a judge thereof on a case stated under the Summary Convictions Act.

By the Summary Convictions Act, being Chapter 218 of the Revised Statutes, 1911, section 92, it was provided:

"When a case is transmitted under this Act, the Supreme Court shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm or amend the determination in respect of which the case has been stated, or remit the matter to the Justice or Justices, with the opinion of the court thereon, or may make such order as to costs as the court may seem fit; and all such orders shall be final and conclusive on all parties."

By the Summary Convictions Act, 1915, being Chapter 59 of the Statutes, 1915, the last-mentioned Act was repealed, section 92 reappearing with some variations as follows:

"The Supreme Court to which a case is transmitted shall hear and determine the question or questions of law arising thereon, and shall thereupon affirm, reverse or modify the conviction, order or determination in respect of which the case has been stated, or remit the matter to the Justice with the opinion of the court thereon, or may make such other order in relation to the matter, and such order as to costs as to the Court seems fit; and all such orders shall be final and conclusive on all parties."

And the question was and is as to whether, this being the last legislative declaration on the subject, it did not abolish the right of appeal which had been allowed by the Court of Appeal Act, 1911, as above stated.

At the outset I think it is unnecessary to do more than state two propositions that are almost axiomatic in their nature. The first is that no Appellate Court can usurp a jurisdiction to interfere with the judgment of a competent Court by merely declaring that it has the jurisdiction to do so, and the second is that the right of appeal is not a mere matter of procedure but a substantive right which can be created only by legislative authority and cannot be

created by the inferior or superior tribunal or by both combined—*Attorney-General* v. *Sillem*, 10 H.L. Cas. 704—and, of course, when granted, can only be abolished by legislative authority. As I have said, the jurisdiction of the Court of Appeal to hear the appeal from my order was upheld by the Court, or at any rate by four of the judges, and they reaffirmed the reasons given in *Rex* v. *Evans*, 23 B.C.R. 128.

I asked the Deputy Attorney-General, if the matter were *res integra*, whether he would be prepared to maintain the jurisdiction of the Court of Appeal, and, with his usual candor, he admitted that he could not, and that he could not see any escape from the conclusion that Section 92 of the Summary Convictions Act, 1915, being the Act under which the conviction took place, cut off any right of appeal from my order to the Court of Appeal.

Notwithstanding that enactment, the majority of the Court held in the present case that the right of appeal still existed under the provisions already recited of the Court of Appeal Act, 1911. In the Evans case the Court held that they had to deal with a conflict between two of the revised statutes, and that, inasmuch as the original Court of Appeal Act was passed later than the original Summary Convictions Act, the latter had to give way, but in Gartshore's case they held that the passage of the new Summary Convictions Act in 1915 made no change in the situation, although passed long after the Court of Appeal Act in 1911. They undoubtedly professed to apply the principle that where two enactments conflict the later legislation must prevail, a principle which cannot be disputed, but, with great deference to the learned judges of the Court of Appeal, I think they misdirected themselves in endeavouring to apply the principle to the legislation in question by inquiring into the priorities of the Statutes which had been repealed.

In *Boston* v. *Lelievre*, L.R. 3 P.C. 151, Lord Westbury, in delivering the judgment of the Privy Council, which, of course, binds both the Court of Appeal and myself, said, in dealing with a converse case of a Court of Appeal refusing to hear an appeal on the ground that it had no jurisdiction:

"The question is governed entirely by the language of the Colonial Statutes. The Court of Appeal in Lower Canada is the creation of the Statute and the subjects upon which appeal lies to that Court are defined with reasonable clearness. The jurisdiction of the Court existed before the consolidated Statutes, but the consolidated Statutes annulled all the antecedent Statutes upon the subject. The consolidated Statutes may be treated as one great Act, and their Lordships think it would not be wrong to take the several chapters as being enactments which are to be construed collectively, and with reference to one another, just as if they had been sections of one Statute, instead of being separate Acts."

And in *B.C. Electric Railway Co.* v. *Stewart*, 1913, A.C., which was an appeal from the British Columbia Court of Appeal, Lord Atkinson says at page 827:

"The Consolidated Railway Companies Act, 1896, and the Municipal Clauses Act, 1896, were passed in the same session of the British Columbian Legislature, but the latter was chapter 37 of the Statutes of that year and the former chapter 55, and pre-

sumably later in date. If there is a repugnancy between them, the later statute must prevail (*Moore* v. *Robinson*)."

In the Evans case, then, it is clear that the method of dealing with the Statutes laid down by the Privy Council would have led to the opposite decision, and I must assume that the Court, if these decisions had been brought to their attention, would have decided that the right of appeal no longer existed. But it is not necessary to me to say anything more about the Evans case, which, in the view of the Court of Appeal, raised the question of a conflict between two Statutes contained in the same consolidation, for in Gartshore's case, the case was not that of a conflict between two Statutes contained in the same revision, but between the Court of Appeal Act of 1911 and the Summary Convictions Act, 1915, and therefore the decision in the Evans case, whether right or wrong, did not necessarily bind the Court in the present case.

On the argument in the present case, the case of *Rex* v. *Sit Quin*, 25 B.C. 362 was referred to. In that case the Court of Appeal held that it had jurisdiction to entertain an appeal from a decision of the County Court on an appeal from Justices of the Peace, under the Summary Convictions Act. With regard to the objection which had been raised to its jurisdiction, the learned Chief Justice says (Martin and McPhillips, JJ.A. concurring):

"Then as to the preliminary objections which we reserved, I see no reason for changing the opinion which I held in *Rex* v. *Evans*. I do not think the subsequent re-enactment or consolidation of the Summary Convictions Act affects the principles which we laid down in that case."

But the Summary Convictions Act does not declare the judgment of the County Court to be final and conclusive, as it does the judgment of the Supreme Court, so that the case of *Rex* v. *Sit Quin* was not necessarily governed by the case of *Rex* v. *Evans*, nor did it necessarily govern this case, and whether it is right or wrong it does not affect this case, and therefore it is unnecessary for me to consider it further.

So that the position is that the Court of Appeal, on the hearing of the appeal in the present case, were not bound by their decision in the Evans case, as the conflict there was between two coeval Statutes, they evidently considering that although the Summary Convictions Act of 1915 was passed before the hearing of the Evans appeal, which had been taken before its passage, it evidently had no bearing on the question, as they made no allusion to it. Nor were they bound by their ruling in the Sit Quin case, as that was the case of an appeal from a County Court and not from a Supreme Court. Nevertheless, they considered that their decision in the Evans case governed both the Sit Quin case and this case. The Court of Appeal therefore arrived at this result, that although the Summary Convictions Act of 1915 repealed the former Summary Convictions Act of 1911, and undoubtedly by Section 92 gave the defendant the right of appeal to the Supreme Court from the decision of the magistrate and by the same section declared the decision of the Supreme Court to be final and conclusive on all parties, it was not, however, effectual to extinguish the right of appeal which had been provided in another Statute of 1911.

With the greatest deference to the learned judges who so held, I think that they could not eliminate the last declaration of the Legislature in this way, and that the decision is in direct violation of the principles laid down by the Privy Council in *Boston* v. *Lelievre* and in *B. C. Electric Railway Co.* v. *Stewart*, as already stated. It may be suggested, although the learned Deputy Attorney-General did not see fit to suggest it, that the phrase in the Statute "final and conclusive on all parties" was not to be taken at its face value, but should be understood as subject to an appeal to the Court of Appeal, and the learned judges have, in fact, read into the Statute some such expression as "subject to the right of appeal allowed by Section 6 of the Court of Appeal Act, 1911"; but this mode of construction has often been condemned by courts of the highest authority.

In *Cushing and DuPuy*, 5 A.C. 409, the Privy Council had to construe a Dominion Statute which enacted that "the judgment of the Court to which an appeal under this Section can be made shall be final." It was argued that this did not necessarily prevent an appeal as of right to the Crown, but Sir Montague Smith, in delivering judgment, said at page 416:

"Then it was contended that if the Parliament of Canada had the power, it did not intend to abolish the right of appeal to the Crown. It was said that the word 'final' would be satisfied by holding that it prohibited an appeal to the Supreme Court of Canada, established by the Dominion Act of the 38 Vict., c. 11. Their Lordships think the effect of the word cannot be so confined. It is not reasonable to suppose that the Parliament of Canada intended to prohibit an appeal to the Supreme Court of Appeal recently established by its own legislation, and to allow the right of immediate appeal from the Court of Queen's Bench to the Queen to remain. Besides the word 'final' has been before used in Colonial legislation as an apt word to exclude in certain cases appeals as of right to Her Majesty (see the Lower Canada Statute, 34 Geo. 3, c. 30). Such an effect may, no doubt, be excluded by the context, but there is none in the enactment in question to limit the meaning of the word. For these reasons their Lordships think that the judges below were right in holding that they had no power to grant leave to appeal."

In *Lock* v. *Queensland Investment and Land Co.*, 1896 A.C., Lord Halsbury says, at page 466:

"Of course, if you can introduce into the language which the Legislature has used other language which would have a different effect (and that has been practically the argument addressed to your Lordships), you may turn any Statute or any section of any Statute into an absurdity. But Table A of the seventh section expressly says that 'the directors may, if they think fit,' make such an arrangement as has been here made; and every effort to turn those plain words into something else has resulted, on the part of the learned counsel who argued it, in an admission that, without the addition of some words, they cannot get into that seventh section that which their argument requires."

In *Salomon* v. *Salomon and Co.*, 1897 A.C., the Lord Chancellor, at page 39, said that he "must decline to insert into that Act of Parliament limitations which are not to be found there."

In *Bank of New South Wales* v. *Piper*, 1897, A.C., Sir Richard Couch, in delivering judgment, says at page 388:

"It is to be observed that in the first part of S. 7, which relates to the sale of delivery of wool that is under a lien, the words 'with a view to defraud' are introduced as an essential quality of the offence; but in the part of the section which relates to the sale and disposition of sheep or cattle that have been mortgaged these words are omitted. This cannot be considered to be an unintentional omission unless it is shown to be so by the context of the section. Their Lordships do not see any ground for construing the section as if the words 'with a view to defraud' had been inserted in this part of it. They cannot alter the offence created by the Statute by the introduction of words which the Legislature has omitted."

In *Regina* v. *Hunt*, 6 Q.B., at page 412, Erle J. said:

"I had been for some time in hopes that I might find language to express this meaning, but it is impossible to do so without inserting words in the section; for it is enacted that his 'decision on the reasonableness as well as the legality of the charges shall be final,' and not that his decision on the reasonableness shall be made in the same manner as on the legality of the charges. Neither can I read 'final' as meaning 'final unless appealed against.' Probably that was the object of the Legislature; but it cannot be done without reforming the words of the Statute; and therefore I agree that this rule must be discharged."

The decisions of the Courts of highest authority therefore make it clear that the Court erred in coming to the conclusion that the enactment that the decision of the Supreme Court was to be final and conclusive on all parties was to be considered as subject to the right of appeal, although the Statute itself provides no such limitation. These decisions are, of course, binding on both the Court of Appeal and myself. In fact, the Privy Council declared in *Trimble* v. *Hill*, 5 A.C. 344, that it was the duty of the Colonial Court of Appeal to follow the decision of the English Court of Appeal in preference to its own former decision where they came in conflict, which admonition has been followed by the Court of Appeal for Ontario, e.g., *Mason* v. *Johnson*, 20 A.R. 414. See, also *Hollenden* v. *Foulkes*, 26 O.R. 61. A fortiori it is my duty to follow and apply the decisions of the highest courts of judicature in preference to those of the local Court of Appeal where they are in conflict.

It is not enough, however, merely to say that the Court had no jurisdiction. An order of a Court made without jurisdiction may be void only if and when it is set aside and declared void by a higher tribunal, as, for instance, where the jurisdiction was conditional on the existence of certain facts or on certain proceedings being taken. Decisions made when the conditions necessary to the existence of jurisdiction did not exist are not necessarily void, especially where the complaining party might have brought the true position to the attention of the Court and failed to do so. But there is vital distinction between a case where there is a limited or conditional jurisdiction to do a judicial act and the case where, as in this case, there is no jurisdiction o do it under any circumstances. In the latter case it is void in the

absolute sense and is just as inoperative for any purpose as if it had never been pronounced. It can establish no right or impose any obligation. It affords no protection to anyone who acts under it. It is, in short, a nullity and, as Chancellor Boyd said in *McLeod* v. *Noble*, 28 O.R. 528, of an injunction which had been issued out of the High Court of Justice with no jurisdiction to do so, "a thing of naught which cannot be disobeyed."

Before taking the step which I am of the opinion I am forced to take, I may say that I have also considered whether or not I should adjourn the matter in order to enable the defendant, with the consent of the Crown, to make another application to the Court of Appeal to reconsider its decision as to its jurisdiction, or, if that were impracticable, then by way of Order of Reference.

But one difficulty is that the Court affirmed its jurisdiction on at least two if not three different occasions, although, as already pointed out, the former cases did not conclude the Court in the present case. The other difficulty is that two of the learned judges have already expressed themselves in the present case as opposed to the reconsideration of the question. In fact, Mr. Justice Martin said in objecting to rehearing the question of the Courts' jurisdiction in the present case:

"I, for one, do not propose to say that I sit here at the beginning of this term and make a ruling which sends one man to the penitentiary and later on in this term or the first of next term to make another which frees another man guilty of exactly the same offence from the same consequences. I give on these questions one ruling once and for all."

And in his judgment referred to *Velesky, Ltd.*, v. *Inland Revenue Commissioner*, 1914, 3 K.B., 458. With all deference, I am unable to see the justice of sending more men to prison because one man has already been wrongly sent there, nor am I able to see the relevancy of the case cited. It was a taxation case, and examination of it shows that the ground on which the English Court of Appeal refused to overrule their former decision was that that decision had been brought to the attention of the House of Lords on the argument in a similar case and that, as that tribunal did not disapprove of it, it was not for them to unsettle the law.

As a matter of fact, the highest tribunals do not hesitate to overrule their former decisions and those of co-ordinate courts, whenever they consider it right, and to show that that is so it may not be amiss to cite the following instances:

In a case involving the question of the legislative power to imprison for contempt, the Privy Council in *Kielley* v. *Carson*, 4 Moore P.C. 63 overrule *Beaumont and Barrett*, 1 M.P.C. 59, Baron Parke delivering both judgments.

In *Sidney* v. *Bourke* it overruled *Bathurst* v. *McPherson*, 4 A.C. 256, on the question of the distinction between misfeasance and nonfeasance.

The United States Supreme Court has frequently overruled former decisions of its own, as, for instance, *Leisy* v. *Hardin*, 135 U.S. 100, overruled *Pierse* v. *New Hampshire*, 5 Howard 504, although that decision was the result of full consideration and was the law for forty years. In *Telghman* v. *Proctor*, 102 U.S. 707, it

overruled *Mitchell* v. *Telghman*, 19 Wall 287, although the validity of the same patent was in issue in both suits and the patentee was a party to both. In *Killbourne* v. *Thompson*, 103 U.S. 168, they overruled *Anderson* v. *Dunn*, 6 Wheaton 204, on the question of the authority of Congress to commit for contempt. In the English Court of Appeal in re Dewhirst's Trusts, 33 Ch. D. 419, Cotton, Lindley and Lopes, L.JJ., overruled the decision of a former Court of Appeal consisting of James, Baggallay and Brett, L.JJ., in *Re Dalgleish*, 4 Ch. D. 143, which had been followed by Jessel, M.R., in *Re Crowe*, 14 Ch. D. 304. In *Fowler* v. *Barstow*, 20 Ch. D. 240, they overruled their former decision in *Great Australian Gold Mining Company* v. *Martin*, 5 Ch. D., on one point. In *Re Hallett's Estate*, 13 Ch. D. 696, they overruled the decision of the Court in *Pennell* v. *Deffell*, 4 D.M. & G. 372, on one point. In The Bernina, 12 P.D. 58, they overruled the decision of *Thorogood* v. *Bryan*, 8 C.B., 115. The Divisional Court in *Bowen* v. *Anderson* (1894), 1 Q.B. 164, overruled its former decision in *Sandford* v. *Clarke*, 21 Q.B.C. 398, on a question of law. In *Fortescue* v. *Vestry of St. Matthew* (1891), 2 Q.B. 170, they overruled *Vestry of St. Mary* v. *Goodman*, 23 Q.B.D. 154. And on the hearing of the appeal the learned Chief Justice said:

"We have on one or two occasions overruled decisions of the full Court. In *Re Tiderington* (1912), 17 B.C. 81; in *Re Rahim* (1912), 17 B.C., 276, in which the Court, consisting of Irving, Martin and Galliher, JJ.A., and myself, overruled the decision of the full Court in *Ikezoya* v. *C.P.R.* (1907), 12 B.C. 454, Irving, J.A., dissenting.

Of course, in considering whether a former decision should be overruled, the Court has always to decide whether the principle of *stare decisis* or that error should be perpetuated is to prevail, and the principle clearly is that the Court should in each case consider whether it would be less mischievous to adhere to the error and leave it to be corrected by some higher authority or to correct the error. I venture to think that it is less mischievous to refrain from sending men to prison without the authority of law than it is to keep on doing so out of deference to an erroneous view of the law.

To sum up the matter, in view of what has taken place, I do not think that I can reasonably require the defendant to make another application to the Court of Appeal to reconsider its decision on the question of its jurisdiction, and therefore I have no alternative but to express my own opinion as to the legality of his imprisonment, and, indeed, I am required to do so on an application for a writ of habeas corpus, as pointed out by the House of Lords in *Cox* v. *Hakes*, 15 A.C. 506.

The only conclusion I can come to is that the decision of the Court of Appeal in the present case, by which it assumed to set aside my order, was the result of a series of misconceptions and must be regarded as having been given *per incuriam*, especially as the principles laid down by the Privy Council in relation to the interpretation of the Statutes were evidently not brought to their attention. If that is so, there is high authority for saying that a decision given

per incuriam does not bind any court. In *Sale* v. *Phillips*, 1894, 1 Q.B. 349, the Divisional Court overruled its own previous decision in *Lewis* v. *Arnold*, L.R. 10 Q.B. 245, and Lord Coleridge, in delivering judgment, says at page 350:

"It is clear that the justices were not bound by *Lewis* v. *Arnold*. That case was decided under a misapprehension. The learned judges were not informed that an incorporated Statute contained a definition of 'owner' which made the landlord liable."

But even assuming that the judgment was not given *per incuriam*, it is undeniably in the teeth of the Statute of 1915, which declared the decision of the Supreme Court to be final and conclusive, which Statute is of paramount authority to the decision of any Court.

For these reasons I am of the opinion that it is my duty to order the prisoner's discharge.

THE GAZETTES.

The Ontario Gazette contains notice of the incorporation of the Citizens Repatriation League. This Association founded by Brig.-Gen. Gunn has unostentatiously been doing a good deal towards assisting returned men during the critical period of their re-establishment in civil life.

OBITUARY.

A promising member of the Ontario Bar was cut off untimely in the death of Mr. George S. Gibbons of London. He was the only son of the late Sir George C. Gibbons. Much was expected of him in the political field, where he had already essayed a flight in the election of 1917. He was only in his 38th year at the time of his death.

WOMAN LAWYERS IN THE MARITIME PROVINCES.

Nova Scotia's first woman lawyer, Miss Emelyne McKenzie, made her first appearance in court recently and won her first case. The first woman to seek admission to the bar in the Maritime Provinces was Miss French, of St. John, now a successful practitioner in Vancouver, who made application for admission in New Brunswick some 10 years or so ago. Her application aroused a good deal of interest at the time because of the contention raised in opposition to it, that a woman was not a " person " within the meaning of the governing Act.

LOCAL AND PERSONAL.

Of an attendance of 102 students at the Manitoba Law School it was found that over seventy-five per cent. are returned soldiers.

Major M. A. Macpherson, formerly of the law firm of Buckles & Co., Swift Current, has been appointed to a position in charge of the legal department of the Soldiers' Settlement Board at Regina.

Hon. Robert A. G. Greenshields has been promoted to the King's Bench, in place of the late Mr. Justice Cross. When at the bar he was an eminent expert in Criminal Law. He has been succeeded in the Superior Court by Mr. E. E. Howard, K.C., one of the best known of the English-speaking section of the Montreal Bar.

J. F. P. Birnie, son of Mr. John Birnie, K.C., of Collingwood, has entered the firm of Wright, Telford & Birnie, in Owen Sound, after three years' service in the Canadian Artillery, which included six months in Hospital with a severe wound.

Capt. A. H. Murphy, for two years at the front with the 14th Royal Montreal Regiment, has graduated with honours and entered into practice with his father, Major T. J. Murphy, in the firm of Murphy and Gunn, London, Ontario.

Edward Bayly, K.C., has been promoted to the office of Deputy Attorney-General of Ontario. He has been in the Department for some twelve years and previously practised in the City of Toronto. University men before his opinions on legal matters had become valuable, consulted him with reverence on matters pertaining to Rugby Football. His legal reading has not been confined to mere departmental routine and few lawyers will be found who have made a more

intimate study of the British North America Act, and the other documents of our Constitution.

Major Lindsay, late of Messrs. Lindsay and Mudie, of Prince Albert, Sask., has entered into a new partnership with Mr. Alex. Hutcheon. Mr. Hutcheon was a well-known practitioner in Regina up to the beginning of the war. He has lately performed legal duties in London in connection with the Canadian Forces, having first qualified by being severely wounded at the Second Battle of Ypres.

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THE ARRANGEMENT OF ENGLISH LAW.

A comparative study of the schemes for legal education that have been drawn up in the various provinces of Canada makes it painfully evident how far we still are from an agreement upon such an elementary matter as the proper classification or arrangement of the subject matter of English law. To the busy practitioner this is a matter of small importance. He wants his law books to be in the main reliable indices, which will enable him to find quickly and certainly the decided case or the section of the statute which bears upon the question immediately before him. But to the professor or the student it is essential that the subject matter of his studies should be scientifically arranged. If it cannot be so arranged, it cannot be scientifically taught, and the student will learn his law, not as a system of principles, but as a miscellaneous collection of rules to be picked up by experience in the rough and tumble of office work. In the long run the difference between good and bad arrangement means the difference between educated and uneducated lawyers; and the difference between these two types makes itself felt before long in the legislation and the case-law of a country.

Without going into the details of the various provincial schemes I would venture to make one or two general suggestions. Of these the first is that we should be up to date. We want to teach our students the

living law as it is administered in Canada to-day. Some of the schemes before me seem to be devised rather for benefit of students living in England in the middle of the nineteenth century. We cling to classifications which have long been abandoned even in the conservative atmosphere of Oxford and Cambridge.

For example, it is absurd in these days to expect a Canadian law student to learn "common law" and "equity" as separate subjects. The distinction between common law and equity is to-day a matter of legal history and should be taught as such. Every important branch of our modern law has been formed by a fusion of legal and equitable rules, and would be unintelligible if an attempt were made to treat them separately. What would we think of a book on the law of contract in which the author avoided all mention of specific performance and injunctions? The same test may be applied to any other branch of our existing law. We have got to learn that our modern law consists of a single body of coherent rules, all of which are administered alike in every court. It is historically true that formerly certain rules were only applied by the common law courts and other rules were only applied in courts of equity. But facts such as these belong to the study of the origin and history of our law. To take a parallel case, it is equally true that our present rules governing intestate succession to personal estate are of canonical origin, and were first applied only in the ecclesiastical courts. Yet what should we think of a law society which arranged for instruction on the law of succession to be given under the heading of "Ecclesiastical Law"? The case is exactly similar to that of equity, and the only reason why we do not see the absurdity of what we are doing is that we find it hard to shake off a lot of ideas which we have imbibed from English nineteenth century text-books.

A scientific classification of law will also avoid any needless overlapping of its divisions. On this principle I think that we should get rid of such a heading as

"Personal Property." All property is acquired either by contract or by succession, testate or intestate, and good books upon those subjects will tell the student all that he need know about the acquisition of property. Injuries to property and all questions relating to the use or abuse of property fall either under the law of torts or under the criminal law. Property in land is the only kind of property which requires special treatment as such.

A critic of others is morally bound to offer some positive suggestions of his own, and I, therefore, venture to put forward, with great hesitation, my own ideas as to the arrangement of a course of legal study.

The student should start with things that are comparatively general and easy of comprehension, complicated and technical subjects being reserved until his mind has been trained to deal with them. Therefore he should begin with that study of elementary legal ideas which we call jurisprudence, learning at the same time the main features of the constitution of his country, its judicial institutions and the sources of its laws. This preliminary study would involve a certain amount of history, and the student should learn at the same time how to compare intelligently the principal institutions of his own with those of other countries. In the curriculum the subjects of this course would appear as Jurisprudence and Constitutional Law and History.

The next thing is to get an acquaintance with the main features of the ordinary law. For academic purposes it seems to me sufficient to classify these under six heads—Contract, Tort, Succession (testate and intestate), Personal Relations, Real Property, and Criminal Law. In the second stage of the student's career the teacher should aim mainly at expounding the general principles of each subject, illustrating them with a careful and sparing selection of a few cases which really lay down fundamental doctrines of law. Questions of detail should be as far as possible postponed until the third stage.

In his third year, if he has given proper attention to his earlier studies, the student will now be fairly well equipped to handle the more intricate questions which arise in the practical application of legal doctrines to the affairs of daily life. His general knowledge of contract will now be applied to the study of such subjects as Bills of Exchange, Sale of Goods, and Partnership. Knowing the general rules of succession to property he can now proceed to learn exactly what are the duties of executors and administrators. In each of his subjects he will now have to acquaint himself with the relevant Dominion and provincial statutes, and bring his knowledge of case-law thoroughly up to date. To this stage also belongs the study of the rules of evidence and of the modern statutes which make up our company law.

In the above scheme it will be noticed that no separate heading is given to the law of trusts. This omission is due to my desire to keep the classification as simple as possible. The creation of trusts depends in almost every case either upon a contract (express or implied) or upon a will. The operation of trusts almost invariably forms part either of the law of succession or of the law of real property. The remedies for breach of trust form a part of the law of procedure.

This brings us to the question of procedure. My own opinion is that the teaching of procedure as such should not form a separate item in an academic course. The main reason for this opinion is a purely practical one. Procedure taken by itself in the abstract and apart from the cases in which it is involved is almost intolerably dull, and therefore it will not be effectively learned. On the other hand in the course of a three years' study of the substantive law no student of ordinary intelligence can avoid acquiring a knowledge of the main outlines of procedure. The study of any one subject necessarily involves a certain knowledge of the procedure that is employed to assert the legal rights which are in question. The law governing damages, injunctions, specific performance and other remedies is

learned incidentally in the study of such subjects as contracts, torts, real property, and succession. A knowledge of the courts and the machinery of appeals comes as a matter of course to any student who reads his cases with a reasonable amount of attention. The minor details will be rapidly picked up in the course of office experience. No amount of lecturing will teach a student the hundred and one small points which he will learn in a few months of office work, and it is a mere waste of time to attempt the impossible. The only part of procedure which is suitable for academic treatment is the law of evidence, and this should form one of the items in the third year of the student's course.

I make these suggestions merely as an outline sketch of a scheme of legal education, and I am sure that points for criticism will readily occur to many of my readers. My main contention is that, whatever plan we do adopt, it should be based upon some clear and intelligible principle. The scheme that I have suggested is based upon the principle of proceeding from the easy to the difficult, from the general to the particular, from the knowledge of rules to their application to the detailed facts of life. If anyone has a better principle to suggest I will cheerfully consign my plan to the scrap-heap. I have been moved to write these notes by the fact that in some of the provincial schemes before me I find it hard to discover any controlling idea at all. They seem to me to suffer from two main defects. In the first place there has been little or no attempt to analyze and classify the subject matter of English law upon a scientific basis. Secondly, it does not seem to be realized that some subjects can be properly taught by books and lectures, while other subjects can only be really learned from experience of office work. Each of these difficult problems must be squarely faced before we can hope to work out a satisfactory scheme of legal education for Canada.

HERBERT A. SMITH.

McGill University, Montreal,
28th November, 1919.

PREMIER DRURY ON THE ADMINISTRATION OF CRIMINAL LAW.

The new Premier of Ontario, speaking at Barrie, is quoted as saying:

> "Some change may be expected in the administration of the laws in this province. At present those who offend the criminal laws are treated as enemies from the beginning. They are dealt with summarily. They are herded together like animals in the Police Courts. The spirit of the administration of these laws should be improved. There should be a change in the treatment of our prisoners.
>
> "It is not a single alteration of the present laws that I speak of, but a change rather in the administration of the laws we have. It may be that no new regulations will be needed for this. An expression from the Government or a hint judiciously given by the Attorney-General may prove to be sufficient. We must have the spirit of justice and charity in our courts. Their object must be to up-lift not to push down."

We venture to predict that it will take more than a hint from the Attorney-General. The first step should be to take the word "Police" out of "Police Magistrate." By a process of usurpation the Police Magistrate's Court has been shortened to "Police Court," not only in name but in usage. These Courts are intended for the two purposes of preliminary investigation into serious crimes and of the summary disposal of cases. The powers entrusted to the Magistrates are very formidable both as affecting the liberty and the reputation of all citizens. A Court that has the power of inflicting life sentences is no petty tribunal.

But the police have made these Courts their own burlesque property. Instead of keeping to their proper place in the back-room until called as witnesses they have usurped the control, elbowed aside the Crown Attornies and are sprawling over the Court room, like

you see a flock of battered ex-pugilists gathering around the corners of a prize-ring. The Premier's words " spirit of levity " are a condemnation milder than 2 per cent. beer for the spectacle of these beefy cynics in uniform shaking their sides in laughter at the jests suggested to the bench by the miseries of the poor.

Nothing goes further to the building up of an irreconcilable and irreclaimable criminal class than the knowledge so many convicted unfortunates possess and cannot forget that the testimony which was believed (or rather acted upon) by the bench as outweighing all others was that of professional witnesses who gained their fluency in stout swearing from frequent attendance at the Court where they could admire and adopt the models furnished by plain-clothes constables.

The police duties and their presence should end with producing the prisoner to the Court and producing the evidence to the Crown Attorney. The sifting of this evidence should be done in the Crown Attorney's office and on him should be the responsibility for presenting or refusing to present the accused before the Court. The vigilance of the Attorney-General can best be directed to a supervision of how this responsibility is being exercised; so that his "hints judiciously given" may have the force of regulations.

Our "police" Magistrates under the present system are persons exercising most serious judicial functions. But they are brought into unfortunate daily or periodic contact with police administration as police commissioners. In fact the police are their hired men. Instead of being judges, the Magistrates are boss constables.

The whole system is bad for the discipline of the police and so bad for the conduct of justice in these Courts that American tourists flock to our Court-house in Toronto to see a spectacle just as in Mexico they would flock to a bull-fight. Our newspapers have accustomed us to a daily gratification of the meanest and most sodden of all human emotions—the pleasure of laughing at the misfortunes of our poorer neighbours.

PROTECTION OF PUBLIC AUTHORITIES FROM VEXATIOUS ACTIONS

And Temperance Legislation.

The Public Authorities Protection Act which appears in the statutes of most of the provinces, *e.g.*, R. S. O. Cap. 89, might better from the point of view of the practitioner be called an "Act for Transferring Vexation from Public Authorities to Solicitors." There are a basketful of catches, some of which are the following: the act complained of must, in the case of a J. P., have been "done maliciously and without reasonable and probable cause"; a certain demand must be made on a constable or bailiff; an action has to be brought within six months. And now according to our London Letter the English Court of Appeal in *Fletcher & Son* v. *Jubb* has added a new terror to this statute by making the solicitor liable to the client for negligence if he is not in a position to prove that he warned the client in time to take proceedings within the six months.

The Statutes which at present are giving the most worry to solicitors in the matter of actions against public officers are the Temperance Acts now being tried out in the various provinces. Under the Ontario Temperance Act the protection afforded to those chosen to enforce it is extraordinarily ample. An inspector is ex officio a constable anywhere in Ontario (s. 119); officers and witnessess have an immunity to violate the Act itself (s. 50 (3) (4).

In a recent case in the Police Court in Toronto an ex-officer under this Act was convicted of extorting $30 from a woman under threat of a prosecution for selling liquor. In commenting on the case the Crown Attorney for Toronto, who has had probably more experience than anyone in prosecuting what are known as B.O.T.A., stated that it was necessary to use the services of persons of this character to secure convictions under the Act. This being the case it is

inevitable that there will be a swarm of complaints against officers for their methods of securing convictions. The complainants will seek to transfer their white-hot indignation to their solicitors with a view to transmuting the complaints into damages. A few of the difficulties which beset the sympathetic solicitor are set forth in the following judgment delivered by Hodgins, J. A., in the recent case of *Goldberg* v. *Cruikshank*, (Ont. W. N. Nov. 21.)

Appeal by plaintiff from order of Gauld, C.J., who decided that the action was not maintainable for anything done under the search warrant but gave plaintiff leave to amend. The defendants are Police Constables.

This Order leaves the plaintiff in as good a position as she could expect and the defendants are not asking that she be deprived of such consolation as it may afford. I do not see why the provisions of the Public Authorities Protection Act cannot be invoked before trial.

The statement of claim alleges a conspiracy by the two defendants to injure the plaintiff financially and rob her of her good character.

The means adopted were to play upon her good nature and induce her to give liquor to the defendant Smith, posing as a sick man, and then to search her house, prosecute her and secure a conviction for breach of the Ontario Temperance Act.

Damage is the gist of an action for conspiracy and this is alleged. It can only arise however under two heads: trespass, due to the search, and malicious prosecution. These matters are not set out as overt acts and are the only ones which could reasonably cause any actionable damage.

The plaintiff is therefore in this dilemma. Her action for conspiracy needs proof of damage to sustain it. That arising out of the search is barred by Section 12, of the Revised Statutes of Ontario, 1914, Chapter 89, which prevents any action being brought

against police officials for anything done in obedience to a warrant issued by a J. P. until demand has been made for perusal and a copy of the warrant and refusal to exhibit it. The issue of the search warrant is sworn to and not denied.

Damages for malicious prosecution do not seem to be recoverable as it is not alleged that the conviction has been reversed.

Without these elements upon which to found proof of damage a finding of conspiracy to injure will be in the air.

If this action can be treated as one for conspiracy to injure joined with claims for damage arising from the search and for malicious prosecution, the result would seem to be the same (*Thomas* v. *Moore* 1918, 1 K. B. 555). The allegations in the statement of claim do not suggest any fraudulent procurement of the warrant if that would make any difference. It may be however that the ingenuity which prompted this form of avoiding the difficulties in the customary actions for wrongdoing such as is here set up may find heads of damage beyond these I have mentioned.

As the defendants have not asked to have the action dismissed, the order appealed from may stand so as to enable the plaintiff to reframe her case though she will perhaps find difficulties awaiting her in the prosecution of the action.

Appeal dismissed with costs to the defendants in any event.

DAMAGES FOR NERVOUS SHOCK CAUSED BY SPOKEN WORDS.

By Right Honourable Sir Frederick Pollock in October Law Quarterly Review.

"Illness caused by sudden alarm or other painful emotion is as capable of proof and of being estimated in damages as any other kind of injury. Fright or 'nervous shock' may be a natural and probable result, not only of immediate fear of bodily harm, but of the impression conveyed by spoken words. If, therefore, threatening words are used for the purpose of unlawful intimidation and coercion, or a false statement is wilfully made for the purpose of giving pain, and their effect on the person to whom they are addressed is to produce physical injury, we have the complete connection of an act calculated to do harm, and done without justification or excuse, and temporal damage consequent thereon, and there is no reason for denying a cause of action to the sufferer. This doctrine is finally established, we think, by the decision of the Court of Appeal in *Janvier* v. *Sweeney* (1919) 2 K. B. 316, confirming *Wilkinson* v. *Dounton* and *Dulien* v. *White*, both well considered cases, as against the opinion of the Judicial Committee in *Victorian Railways Commissioners* v. *Coultas*, 13 App. Ca. 222, and a minority of judgments in other jurisdictions which have taken the same line. It will be observed that the Court of Appeal did not think it necessary to call on counsel for the plaintiff. That being so, the chance of the House of Lords overruling their judgment may be neglected.

"The grain of truth in the contrary opinion is that a state of mind such as fear or grief is not itself a tangible cause of action; the conclusion that bodily suffering consequent upon it is necessarily too remote to be actionable was hasty and illegitimate. Although this result is well within the lines of fairly old authority, it increases, to our mind, the difficulty of maintaining the

view quite lately held by some very learned persons, that the Common Law does not recognize any general duty not to do harm to one's neighbour without justification or excuse. Such a cause of action as we have in *Janvier* v. *Sweeney* cannot be assigned to any of the old categories which were supposed to exhaust the law. It has nothing to do with defamation, and it was settled long ago (though not always) that words cannot amount to an assault. Neither is it analogous to any form of trespass or nuisance, for no right of property is affected. A living human body is not property. What is the action then? An innominate action on the case? But, then, what conjunction of harmful intention or recklessness with consequent damage can be formally excluded? The supposed miscellaneous category is not really a supplement, but involves a principle covering the whole ground. After all, *alterum non laedere* is a very old precept though the Romans never worked it out."

OUR LONDON LETTER.

44 Bedford Row,
London, W. C. 1.
12th Nov., 1919.

The Editor,
"Canadian Law Times,"
Toronto.

SIR,—The past month has witnessed a number of judicial changes consequent of the resignation by Sir Charles Swinfen Eady of the position of Master of the Rolls, to which he was appointed a little more than eighteen months ago.

The retirement of Sir Charles Swinfen Eady from the Bench will in any case be a cause for regret, but the regret is deepened by reason of the serious illness which has made it necessary. Sir Charles has occupied a seat on the Bench for eighteen years, of which over eleven were spent as a Chancery Judge and nearly five as a Lord Justice of Appeal. Excellent as a judge of first instance, he greatly enhanced his reputation when he went to the Court of Appeal. He possessed a large knowledge of legal principles, a firm grasp of facts and a keen interest in his work. Sir Charles started his legal career as a solicitor, being admitted in 1874, and his name remained on the Roll for over two years. He was called to the Bar by the Inner Temple in 1879, acquired a very large practice as a junior, and established a leading position among Chancery K.C.'s on taking silk in 1893. He was appointed a Judge of the Chancery Division in 1901, and in 1913 was promoted to the Court of Appeal. In May, 1918, he succeeded Lord Cozens-Hardy as Master of the Rolls. Sir Charles' eminent judicial services have been fittingly recognized by the conferment on him of a peerage.

In filling the vacancy in the office of Master of the Rolls thus created, the natural course would have been to appoint an equity lawyer to the post. The Lord

Chancellor has, however, preferred his own branch of the law, and has transferred Lord Sterndale from the Probate, Divorce and Admiralty Division to the Presidency of which he was appointed in the autumn of last year on the death of Sir Samuel Evans. When at the Bar the new Master of the Rolls (better known as Lord Justice Pickford) specialized in commercial and shipping cases. He became a Judge of the King's Bench Division in 1907, and was made a Lord Justice of Appeal in 1914. As President of the Probate Division he has fully maintained the high standard set by his distinguished predecessor in the work of the Prize Court, and his wide range of legal learning, his extensive knowledge of commercial law, and fine judicial temper eminently fit him for the work of the important office to which he has been appointed.

Lord Justice Duke has been promoted to the office of President of the Probate Divorce and Admiralty Division. This appointment has met with hearty approval. The distinguished place which Sir Henry Duke occupied at the Bar before he succeeded Mr. Birrell as Chief Secretary for Ireland in 1916 made him eligible for high judicial office. Formerly a journalist he was called to the Bar in 1885, and Sir Charles Swinfen Eady becoming Master of the Rolls in May of last year, he was raised to the Bench as a Lord Justice of Appeal.

The vacancy thus caused in the Court of Appeal has been filled by the promotion of Mr. Justice Younger from the Chancery Division. The appointment is excellent, the only criticism being that Mr. Justice Eve, the Senior Judge of the Chancery Division, who has been sitting as a temporary judge in the Court of Appeal during the absence of the Master of the Rolls, possessed even greater claims to the appointment. The new Lord Justice was born in 1861. Called to the Bar in 1884, he took silk in 1900 and became a Bencher of Lincoln's Inn in 1907. He was raised to the Bench in 1915. Sir Robert Younger rendered notable services to the nation as chairman of one of the Advisory Com-

mittees on the Internment and Repatriation of Aliens and as a delegate to The Hague Conference on the exchange and better treatment of prisoners of war.

The vacancy in the Chancery Division created by the promotion of Mr. Justice Younger to the Court of Appeal has been filled by the elevation to the Bench of the Hon. Frank Russell, K.C. The new judge, who is the fourth son of the late Lord Chief Justice, Lord Russell of Killowen, is 52 years of age and was called to the Bar by Lincoln's Inn in 1893, taking "silk" in 1908. An exceedingly able pleader, and possessed of a profound knowledge of equity, he was much in demand in the Chancery Division, and twelve months ago joined the ranks of counsel coming under the title of "specials"—silks who are engaged in big cases and are entitled to charge a special fee of 50 guineas in addition to the fees on the brief. This appointment also meets with universal approval.

The reconstructed Cabinet (which takes the place of the War Cabinet) consists of twenty members—only three less than Mr. Asquith's Coalition Cabinet, the size of which caused so much criticism. The seats in the new Cabinet are pretty fairly allotted among the parties, Unionists taking 11, Liberals 8 and Labour 1. The new Cabinet differs from the old peace-time Cabinet chiefly by the disregard of the ancient rule that no minutes were to be kept of its proceedings. There is a printed agenda; a secretary is present to record its decisions, and his notes subsequently appear as printed minutes. Until the formation of the War Cabinet three years ago the only record ever made of Cabinet proceedings was the letter in which the Prime Minister acquainted the Sovereign with the decisions reached by Ministers.

The omission of the Attorney-General from the reconstructed Cabinet is, I understand, to the liking of the Temple, not because Sir Gordon Hewart is not deemed worthy of all the honour that can be paid to his office, but because it is considered undesirable on con-

stitutional grounds that the senior Law Officer of the Crown should be a Cabinet Minister. Sir Rufus Isaacs, who became a member of the Cabinet in 1912, was the first Attorney-General to be given Cabinet rank. In omitting the senior Law Officer from the Cabinet, Mr. Lloyd-George has, therefore, merely reverted to what was the immemorial practice until seven years ago. The Attorney-General performs many semi-judicial functions. He decides in many important cases whether a prosecution shall be instituted, and it is obvious that his responsibilities as a member of the Cabinet may sometimes conflict with his duties as a Law Officer of the Crown.

The office of Lord President of the Council, to which Mr. Balfour has been appointed on vacating the position of Secretary of State for Foreign Affairs, is in point of dignity one of the highest in the gift of the Crown. The President of the Council is appointed by a declaration made in Council by the King. In the House of Lords the Lord President, if a member of that body, ranks next after the Lord Chancellor and the Lord Treasurer (whose office has been in commission for over two centuries). By custom he takes the first place at the Council table at the King's right hand. Before the establishment of the War Cabinet the presidency of the Council was one of the offices (not more than ten in number) which invariably brought their holders into the Cabinet.

Mr. Bonar Law has stated in the House of Commons that, in view of the increasing burden of taxation, the Government do not propose to revise the salaries of judges.

The Minister of Labour has introduced into the House of Commons a Bill to provide for the establishment of an Industrial Court and Courts of Inquiry in connection with Trade Disputes. For the purpose of the settlement of such disputes the Bill provides for the establishment of a standing Industrial Court, consisting of persons to be appointed by the Minister of

Labour of whom some shall be independent persons, some shall be persons representing employers, and some shall be persons representing workmen. Provision is made for the reference to such Court of any trade dispute. By Part II of the Bill it is provided that where any trade dispute exists or is apprehended, the Minister of Labour may inquire into the causes and circumstances of the dispute, and, if he thinks fit, refer any matters appearing to him to be connected with the dispute to a court of inquiry appointed by him for the purpose of such reference, and the court shall inquire into the matters referred to them and report thereon to the Minister. "Trade dispute" is defined by the Bill as "any dispute or difference between employers or workmen, or between workmen and workmen connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any person."

An onerous duty is cast upon solicitors by the decision in *Fletcher & Son* v. *Jubb, Boult & Hellewell,* which was before the Court of Appeal on the 21st October. It will be remembered that by the Public Authorities Protection Act, 1893, all actions against local authorities for acts or omissions are barred unless brought within six months of the act complained of. This statutory limitation it is the duty of a solicitor to bear in mind when dealing with the affairs of a client. If he forgets it, and fails to warn his client to take steps in time with the result that his action is barred and he suffers loss in consequence, the solicitor is guilty of negligence and can be sued to make good his client's loss.

The Bill to empower women to become solicitors, which was passed by the House of Lords before the Recess, has passed the Committee stage in the House of Commons.

Mr. H. B. Irving, whose death on October 17th, is universally regretted as a severe loss to the English

stage, was a member of the Bar, having been called by the Inner Temple in 1894. Though he never practised, he was the author of several works of special interest to lawyers, and took a great interest in criminology.

Sir Frederick Pollock has retired from the editorship of the *Law Quarterly Review*, a position which he has held for 35 years, and is succeeded by Mr. A. E. Randall, who is well known to the profession as the editor of Leake's works and as a frequent contributor to the *Review*.

The President and Members of the Cour de Cassation of Belgium, who have been in this country, visited the Law Courts on the 23rd October. They were given seats on the Bench in the Lord Chief Justice's Court, where they were welcomed by Lord Reading and the Attorney-General, Sir Gordon Hewart.

Yours, etc.,

W. E. WILKINSON.

THE B. N. A. ACT: AGREEMENT OR GRANT.

Our readers will remember Mr. Falconer's able argument in our May issue. We take pleasure in submitting the following letter in amplification thereof:

Dear Sir,

As a further illustration of the points raised in my article published in the May number, I should like to call attention to the language of Lord Haldane in giving the judgment of the Privy Council in "Re the Initiative and Referendum Act," 48 D.L.R., pages 18, etc.

Page 22,

> The scheme of the Act passed in 1867 was thus, not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a Central Government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy, and to be directly under the Crown as its head. Within these limits of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be supreme, and had such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces, in accordance with the scheme of distribution which it enacted in 1867."

Page 23,

> " The Act then, by two well-known sections, 91 and 92, distributes the powers of legislation which it confers between the Dominion Parliament and the Provincial Legislatures."

This language appears to express two views:—

1. That the powers exercisable by the Dominion and the Provinces in matters within their respective jurisdictions are as broad as those formerly held by the Imperial Parliament.

2. That these powers were conferred by the British North America Act.

I suggest for the reasons stated in the article referred to, that the first of these statements is correct, and the second is incorrect.

I am, yours truly,

A. FALCONER.

BY THE WAY.

Change of Editor.

The present Editor finds himself unable to devote the necessary time to these pleasing duties. On vacating the chair, he takes the opportunity of thanking our contributors for their support during the past year. The editorial pen and eke the traditional scissors, paste, blue pencil and other weapons of office will be wielded by Mr. Bram Thompson, B.A., a member of the Irish and Saskatchewan Bar, who is removing from Regina to Toronto. He is already well-known to our readers as a contributor by his cogent and incisive writings on "Parliamentary Divorce in Canada," and "Canada's Suzerainty over the West."

MOB LAW.

There are two kinds of law that are not law, Mob Law and Martial Law, and if the former manifestation of brute force continues long enough it is inevitably succeeded by Martial Law, which is simply better organized and directed brute force. We had recently in Kitchener an explosion of temper which left the city for a short time under mob rule. In one sense it was "asked for." There could be no more unpardonable and unpatriotic form of insolence than the proposition to reimpose the name of Berlin on a Canadian city. The veterans have hitherto in Canada shown themselves by far the most steady-nerved and law-abiding of our citizens. Incitements to lawlessness have not hitherto proceeded from genuine war veterans, but sporadically from clergymen and other people who do not understand the danger of "cutting loose." Veterans are educated by their discipline to hold themselves in check until Zero Hour. It is, perhaps, not sur-

prising that the veterans of Kitchener accepted the "Berlin" insult as an announcement of Zero Hour and "Went over the Top."

The episode may usefully teach us two lessons. First, that there is a danger line beyond which loose-tongued people must not go in advocating things which are intensely irritating to every man who made sacrifices at home or at the front in the recent War.

And secondly, and chiefly that mob law is a bad remedy— utterly and unamendably bad. The attack on Mr. Euler, a member of parliament, might very easily have resulted in his falling from a window and breaking his neck. Students of history will recollect that one of the most terrible catastrophies of the human race, the Thirty Years War, began with the "Defenestration" of the Austrian Envoys (throwing them out of a window). These efforts of mob violence are as open to one side as to another, and carry the inference to moderate thinkers that they are resorted to in the absence of sound arguments. The wrecking of a newspaper office may stop an issue. But it did not stop William Lyon Mackenzie; rather it made him tenfold more dangerous throughout old Upper Canada.

Killing or buffeting, breaking the neck or blacking the eyes of or ducking a public man is historically considered the craziest method of propaganda. It was tried with Julius Cæsar and resulted in an interminable line of Cæsars and Kaisers until our day. That it was a success when applied to breaking the heads of the Gracchus family merely proves that it is an effective weapon only in the hands of profiteers. The mob itself is never the gainer. But reckless loot-seeking thugs sometimes make small gains and calculating politicians who fish in troubled waters often make a real capital.

Convictions Under Orders-in-Council.

Until recently Canada was at war and technically still is at war. It is very hard for the stay-at-home

people during a war to realize that not only the soldiers but the whole nation must be under discipline. Even the carefully indoctrinated German people could not be thoroughly taught this. At least Ludendorf in his memoirs bitterly complains of laxity in the war-spirit of the civilian population. Among English-speaking peoples attempts to induce discipline by rationing foods, restricting profits and curtailing the loose-lipped blatancy of soap-box orators were regarded at first with incredulity and always with impatience.

Nevertheless the man-at-home should have been willing to take his medicine equally with the man-at-arms. Canada was probably more tepid in her efforts to induce home discipline than any other English-speaking or allied country. Our people reflected the self-sacrifice of our splendid troops by an orgy of luxury and profiteering. Our Orders-in-Council restricting spoken and written publications tending to undermine the war-spirit of the nation were quite mild considered as war measures.

But it is well to remember that, like Court-Martials among the Military, trials for breach of Orders-in-Council among the civilians were disciplinary. In other words convictions did not always represent a cool sifting of testimony and administration of exact justice. They were the working of a formidable disciplinary engine which worked quickly and roughly and was calculated to inspire terror. Now that the war is over it is right and necessary that there should be a careful reconsideration and revision downwards of the sentences.

FEES ON COMMERCIAL MATTERS.

The Commercial Law League of America which has over 6,000 members including a good representation of Canadian Law firms has proposed a new uniform tariff for collection:

UNIFORM RATES.

Recommended by the Commercial Law League of America, at its Twenty-third Annual Convention (1917), effective November 1, 1917.

15 per cent on the first $300.00.
8 per cent on the excess of $300 to $1,000.
4 per cent on the excess of $1,000.
Minimum fee, $5.00.
On items of $10.00 or less 50 per cent.

Minimum fee for suit, $7.50. Commissions to be added; but total in no case to be over half the claim.

In their circular to the Canadian profession they say:

"Why do we write you?

"Because the profession in Canada is getting the little end of the stick. Is there any reason why the Canadian solicitor should not be as well compensated as is the American attorney? Is the cost of living less with you? Does the volume of your business make it possible and proper that you should charge less? Is your labor less exacting and onerous?

"Of course not. Yet, when we go to the Canadian law lists and agencies through which you get some of your employment and whose rates must largely govern in the Dominion, they tell us Canadian lawyers are satisfied with the old rates.

"We do not believe it; or, rather, we believe they are mistaken.

"And here is a still more exasperating feature of the matter. There are prominent United States law lists and agencies that publish openly that their fee rates to American lawyers are the League's

rates, based on the 15 per cent. schedule, but that to Canadian lawyers they are the old 10 per cent., and they tell us the reason is they must do this to compete with Canadian lists and agencies that cling to the old 10 per cent remuneration for their lawyers."

"In other words, Canadian law lists and agencies are not only preventing Canadian lawyers from getting fair compensation on Canadian business but they are preventing American forwarders of business from giving them the fair compensation they are now universally giving United States lawyers."

"We have labored with these lists direct until we are tired out. Our only recourse is to approach the Canadian Bar direct and ask its members to protect their own interests by protest and then by actual refusal to longer work on terms established a generation ago and that are kept alive in Canada, simply because the Canadian lawyers are not awake to their rights and their opportunities and permit the agencies and law lists in the Dominion to perpetuate the old rates for the declared reason that the Bar is satisfied, whereas the real reason is their competition among one another to give their subscribers cheap service—to save money for themselves and their customers, a difficulty every American agency and list has met and vanquished, with the result that the American business settled down almost at once to an acceptance of the reasonable demand of the lawyer for better compensation."

It appears to us that this is a matter which could usefully be decided by the Canadian Bar Association. There is a proper dislike in the profession to payment on a commission basis and to avoid discussion of such matters. But we had to deal with it in real estate transactions and there is no reason why we should not collectively settle it in commercial matters.

CANADIAN BAR ASSOCIATION.

REPORT OF THE COMMITTEE ON LEGAL ETHICS.

At the Annual Meeting of the American Bar Association in 1905 attention was called by the President, Henry St. George Tucker, of Virginia, to a striking statement by President Theodore Roosevelt—

> "that many of the most influential and most highly remunerated members of the Bar, in every centre of wealth, made it their special task to work out bold and ingenious schemes by which their very wealthy clients, individual or corporate, can evade the laws which are made to regulate, in the interest of the public, the use of great wealth . . . that such a lawyer is doing all that in him lies to encourage the growth in this country of a spirit of dumb anger against all laws and a disbelief in their efficiency. Such a spirit may breed the demand that laws shall be made even more drastic against the rich, or else it may manifest itself in hostility to all laws."

In his address Mr. Tucker suggested the adoption in all Schools of Law of an enlarged and comprehensive course in the subject of legal ethics to be taught by men of lofty ideals which they try to live up to and not merely talk of.

Thereupon a committee of five was appointed, of which Mr. Tucker was Chairman, to report at the next meeting upon the advisability and practicability of the adoption of a code of professional ethics by the Association.

At the annual meeting in 1906 the Committee reported that the adoption of such a code was not only advisable but under existing conditions of very great importance, that unless the public had confidence in the integrity of the administration of justice there could be no lasting permanence to republican institutions; that with the influx of increasing numbers who seek admission to the profession mainly for its emoluments, have come new and changed conditions. Never having realized or grasped that indefinite ethical something, which is the soul and spirit of law and justice, these

men not only lower the morale within the profession but debase our high calling in the eyes of the public.

It was considered that the adoption of a code by the American Bar Association would tend to develop uniformity of practice between the various states.

Another reason given for the adoption of a code was that many men depart from honourable and accepted standards of practice early in their legal careers as the result of ignorance.

In 1907 the Committee presented a report recommending that Sharwood's well-known essay on professional ethics, first published in 1854, should be reprinted and issued in a volume supplementary to the Annual Report. The Committee was directed to have the proposed canon of professional ethics prepared by 1st May, 1908, to transmit a copy to each member and to the Committee of the respective State Bar Associations for criticism and suggestions, and that the final report should be ready for submission at the 1908 meeting, when it was adopted in its present form.

The Law Society of Upper Canada considered a code of professional ethics years ago at the suggestion of the late Mr. Justice Rose, with the approval of Dr. Hoyles, Principal for over twenty years of the Law School at Osgoode Hall. The matter was considered by the Legal Education Committee of the Benchers, but was not favourably entertained at that time. The late Mr. Christopher Robinson, K.C., was one of the principal opponents. He took the position that legal ethics could not be taught in that way, that it was merely a matter of mental and moral education, and not one that could be reached by the adoption of formal rules, and the proposal was abandoned. For a number of years, however, lectures on professional ethics have been given to the students in attendance at the law school at Osgoode Hall, by Mr. Justice Riddell, Mr. Hamilton Cassels, K.C., Mr. Edwin Bell, Secretary of the Law Society, and others. The Principal, Dr. Hoyles and lecturers on the staff of the law schools also endeavour to

impress on the students the broad principles of legal morality. Whether or not this was the proper conclusion at the time, Dr. Hoyles still remains of opinion that it would be a very desirable thing to have something in the way of definite principles formulated for the guidance of students of the law, without going too much into details, where the difficulties suggested by some of the opponents of a code might be likely to arise. Dr. Hoyles is of opinion that something is needed to impress upon practitioners the viewpoint of the profession which is set out by Mr. Elihu Root, in an address delivered before the American Bar Association in 1916. He speaks of the "true spirit of the profession" as being one "not of mere controversy, of mere gain, of mere individual success. To the student of the law there come from all the glorious history of the profession of advocacy, great traditions and ethical ideals and lofty conceptions of the honour and dignity of the profession, of courage and loyalty for the maintenance of the law and the liberty that it guards. It is to a Bar inspired by these traditions, imbued with this spirit, not commercialized, not playing a sordid game, not cunning and subtle and technical, or seeking unfair advantage—a Bar jealous of the honour of the profession and proud of its high calling for the maintenance of justice—that we must look for the effective administration of the law."

In view of the changed and changing conditions of this country, and the large number of students now admitted to practice, many of whom come from various countries whose traditions and surroundings have not been similar to those of our own and the Motherland, the time may be considered as having arrived when it is necessary to reduce to writing for the information of the members of the Bar and the guidance of our law students some of the most important general principles governing the conduct of the profession towards the Bench, the public, and their clients, setting forth among other things the ideals and standards of the profession,

its honour, dignity and traditions, but without going too much into particulars as the American Bar Association appears to have done, and without being deemed exhaustive of the subject. This statement should not go into minute details or essay to accomplish the impossible task of providing for changing circumstances which are bound to arise in future.

The Saskatchewan Bar Association and the Benchers of Alberta have both taken steps towards the preparation of a code, and a draft has been submitted by Dr. James Muir of Calgary to the Law Society of Alberta.

Your Committee would recommend that a select committee be appointed by the President of the Association to prepare such a statement of the principles of legal ethics as has been suggested in this report, using amongst other data the code of the American Bar Association supplemented by the draft code prepared for the Law Society of Alberta, as well as a similar code prepared some years ago and adopted by the Ontario Bar Association, and that such Committee make its report at the next meeting of the Association.

ANGUS MACMURCHY,
Convener.

Winnipeg,
August 27th, 1919.

DEPORTATION OF ALIENS WHO ADVOCATE THE OVERTHROW OF GOVERNMENT BY FORCE.

The status of the Parlor Bolshevist and the Philosophical Anarchist and other pet rattlesnakes seems to be settled in the United States. We quote the following from the Central Law Journal.

"No movement has received such enthusiastic approval on the part of the people as the present round-up of foreign radicals and their deportation under the Immigration Act of February 5, 1917, 39 Stat. 834. Section 19 of this act provides for the arrest and deportation within five years after entry of any alien who at the time of entry was a member of one or more of the classes excluded by law. It then provides for the deportation of classes of aliens therein mentioned, irrespective of the time of their entry into the United States, and among those so specified is the following:

"Any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the government of the United States or all forms of law or the assassination of public officials.

"An interesting evidence of the favourable construction of this act on the part of the courts is shown by the recent case of *Lopez* v. *Howe*, 259 Fed. 401. In this case a decree of deportation has been rendered against Frank R. Lopez, who came to this country from Spain fifteen years ago, but was never naturalized.

"Lopez claims to be a 'philosophical' anarchist. For which reason he claimed the lower court could not deport him under the act. He declared that he was opposed to murder or assassination. 'Everyone has a right to live,' he declared on

his examination. He, however, admitted that he was an anarchist, but a ' peaceable ' one. The Court of Appeals (2nd Cir.), however, does not believe in ' peaceable ' anarchists, for it has the following to say on this point:

" ' A great deal was said at the argument of the distinction between philosophical anarchists and anarchist communists. The two represent very different schools of thought. There is a class of honest and law-abiding visionaries, who are convinced that the interest of society would be promoted by the abolition of all government whatsoever. Their propaganda is purely educational in character, and violence does not enter into it. They do not believe in force, or in war, or in the taking of human life. The relator evidently belongs to that class. But while the student of social science may discriminate between philosophical anarchists and other kinds of anarchists the act of Congress now under consideration does not; and no such discrimination is necessary, for the constitutional power to exclude or to deport does not depend upon whether the alien is or is not a criminal, or the advocate of lawless ideas.'

" Lopez claimed that being a ' philosophical ' anarchist, his case came within the five-year limit, and since he had been here longer than that, he was not liable to deportation. On this point the court said:

" ' Because he is a philosophical anarchist, and is opposed to the overthrow of government by force or violence, the relator claims he is not within the provisions of section 19 of the act of Congress, except in the 5 year class, and that, as he has been in this country for 15 years, he cannot be deported. From what has been said in an earlier part of this opinion, it appears that the relator's understanding of the statute differs from the understanding of this court. That section deals with

a number of different classes of aliens, and provides that certain classes may be deported at any time within 5 years after entry, but does not so limit the time of deportation as respects certain other classes, as to whom it is declared they may be deported, irrespective of the time of their entry into the United States. An alien at the time of his entry may not be an anarchist, and therefore may be entitled to enter. But if at any time after his entry he is found 'advocating or teaching anarchy,' he may be deported. The relator's testimony, only a portion of which has been quoted, shows conclusively that he is an advocate and a teacher of anarchy, making speeches in its favour, organizing anarchist groups, and distributing anarchist literature. As he reads and writes Spanish, Italian, Portuguese, and English, he is a man of ability, who naturally has influence with his associates. That he is liable under the law to deportation admits of no doubt.'

"See also recent case of *Ex Parte Pettine,* 259, Fed. 733, which announces the same rule. See also 194 U. S. 297, 24 Sup. Ct. Rep. 719."

INDEPENDENCE OF JUDGES.

Our Canadian public is decidedly not squeamish. The British public on the other hand has during the last hundred years developed a delicacy in the matter of its statesmen and judges which would not have been understood in the days of Pitt and Fox; or if understood would have been classed as odious hypocrisy. Take the matter of Nepotism. During the late war a small item appeared in the British Press that Lloyd George's son who was a captain was about to be made a Lieut.-Colonel. Immediately a growl, like unto the growl of a Kadiac bear, issued from every editor in Great Britain. Lloyd George's son was not made a Lieut.-Colonel.

Again a small item appeared in the British press that Winston Churchill (who had been head of the Admiralty, who had seen several British Campaigns in India and Egypt and written valuable military books), and who was a Major in the Guards, was going to be given a brigade at the front. Immediately the British newspapers sang like the howl of our recent destructive storm amid the electric wires. Winston Churchill did not get the brigade.

Now in Canada nobody would have spilled or did spill any ink if and when a Cabinet Minister's son, brother or brother-in-law, got a regiment, brigade or division. Not a query would be or was raised in the House of Commons nor would or did a thunderbolt leave the hand of an editor. In these matters we are still in the days of Pitt and Fox and our stomach is not squeamish.

So in the matter of the dignity and independence of judges. Our progress in sentiment may be real, but it is imperceptible. Nay more, it is not a progress towards the front, but like that of the later German Communique's, it has been "a withdrawal in accordance with a strategical plan." We are worse off in this matter than 20 or 40 years ago.

Sixteen years ago that iconoclast among Canadian publicists, Mr. John E. Ewart, K.C., wrote for this periodical a straight-hitting article entitled "Jobs for Judges." He particularizes on this.

"(3) Jobs—as I choose to call them. Governments in this class of cases are authorized by statute to issue commissions in respect of a variety of subjects; to give the work to any judge they choose; and to pay him what they please."

We have already expressed not *our* but the *only* opinion of commissions where governments by naming their judges can deal themselves cards from the bottom of the pack.

In this old article of Mr. Ewart's he asks:

"I take my stand upon this: I ask any practitioner of twenty-five, twenty, or even ten years' standing, "Does the Canadian judiciary occupy the same position in public estimation to-day as within your recollection? Now, do not answer 'Yes, in the minds of all reasonable people'; for a great many people (as you think) are very far from being reasonable, and yet it is important that they, too, should have a good opinion of the judges. Admittedly, then, there has been a serious change for the worse in this respect, and the question we have to consider and get a good reply to, at our peril, is 'What is the cause of the change?' My answer is, Jobs. If there be any better let us have it."

This was in 1903. Ask the same question in 1919. We get the same answer plus a further reason, viz., the decay of salaried greatness.

The salary of a judge sixteen years ago meant socially four times as much as when compared to-day with the swollen incomes of his rich-after-the war neighbours. But lately the House of Commons gently raised some of these salaries of judges and pried a burglar's jimmy under their independence by rendering them liable to taxation.

Truly we are in the days of Pitt and Fox.

RECENT SUPREME COURT DECISIONS.

CASE THRESHING MACHINE CO. v. MITTEN.

SASK.] [OCTOBER 14TH, 1919.

Sale—Principal and agent—Mitten contract—Evidence—Acceptance —Verbal representations—Warranty—Return of goods.

The respondent ordered from the appellant "one 40-horse-power Case Gas Engine." The agreement provided that "the purchaser" could claim "the return of moneys paid . . . only . . . after he had returned the . . . goods to the place where he had received them;" and that "no representations, warranty or conditions, expressed or implied, other than those herein contained, nor . . . any agreement collateral hereto, be binding upon the vendor unless it is in writing." The engine was delivered to the respondent, accepted by him in May, 1915, and never returned to the appellant. A promissory note due in November, 1915, was paid by the respondent without any protest. The engine had two tanks, one labelled "Kerosene," and one "Gasoline." An agent of the appellant represented to the respondent that the engine would also operate on kerosene and promised to send experts; but it stopped whenever so operated. On an action by the appellant for the price of sale, the respondent alleged fraud and misrepresentation.

Held, Idington, J., dissenting, that, upon the evidence, the engine delivered to and accepted by the respondent was the engine ordered in the written agreement of sale.

Per Anglin, J.—The agreement contained no warranty that the engine would run on kerosene, breach of which would support a claim of damages. *Schofield* v. *Emerson* (57 Can. S. C. R. 203), distinguished.

Per Brodeur, J.—By paying his promissory note without protest and, *per* Brodeur and Mignault, JJ., by not returning the engine to the appellant, the respondent waived any right he might have to rescission.

Judgment of the Court of Appeal ([1919], 1 W. W. R. 101), reversed, Idington, J., dissenting.

Appeal allowed with costs.

Lafleur, K.C., and *Bastedo*, for appellant.
Belcourt, K.C., for respondent.

LAVIGNE v. NEAULT.

QUE.] [OCTOBER 14TH, 1919.

Servitude — Servitude of support — Conventional — "Destination de père de famille"—Common wall—"Pignon" or gable—Arts. 522, 551, 560, C. C.

The appellants are the owners of lot No. 694 of the City of Three Rivers, and the respondents are the owners of the adjoining lot

No. 695. These two lots formerly belonged to one Hart who, in 1832, sold lot No. 694 to one Woolsworth. One clause of the deed reads as follows:—"Il est convenu et arrêté entre les parties que Erastus Woolsworth aura droit à perpétuité de bâtir, accoter contre et sur le mur en pierres et en briques du pignon nord ouest du magasin et maison du dit sieur vandant et érigée sur l'autre partie du dit lot de terre, lequel pignon sera mitiyen entre les parties."

Held that the right of *mitoyenneté* claimed by the appellants is a conventional servitude and not a *servitude* de père de famille.

Held, that the word "pignon" means not merely triangular gable at the top of the wall, but the entire north-west gable end of the grantor's house; and the whole wall, including its foundations, has been declared *mitoyen* by the deed of sale. Duff and Mignault, JJ., dissenting.

Judgment of the Court of King's Bench (Q. R. 28 K. B. 14), reversed, Duff and Mignault, JJ., dissenting. *Delorme* v. *Cusson* (28 Can. S. C. R. 66), distinguished.

Appeal allowed with costs.

Geoffrion, K.C., for appellant.

Lafleur, K.C., and *Duplessis*, for respondents.

THE KING v. JOU JANG HOW.

B.C.] [OCTOBER 16TH, 1919.

Appeal—Jurisdiction—Habeas corpus—"Criminal charge"—Person at large—R. S. C. c. 139, ss. 39 (c) and 48 "Supreme Court Act"—8 & 9 Geo. V. c. 7, s. 3.

A Board of Enquiry, proceeding under the "Immigration Act," ordered the deportation of the respondent, who thereupon applied for a writ of *habeas corpus*. The writ was refused by the trial judge, but the Court of Appeal granted it and ordered the respondent's discharge.

Held, that an appeal from the court of final resort in any province except Quebec in a case of *habeas corpus* under sec. 39 (c) of the "Supreme Court Act" will not lie unless the case comes within some of the provisions of sec. 48, as amended by 8 and 9 Geo. V., ch. 7, sec. 3. *Mitchell* v. *Tracey* (58 Can. S. C. R. 640) followed.

Per Duff and Anglin, JJ.—The words "criminal charge" in sec. 39 (c) of the "Supreme Court Act" mean a charge preferred before a tribunal authorized to hear such a charge either finally or by way of preliminary investigation; and the Board of Enquiry under the "Immigration Act" is not a tribunal by which the respondent could have been convicted of criminal offence.

Per Duff and Anglin, JJ.—The right of appeal given by sec. 39 (c) in cases of *habeas corpus* does not exist where the court below has ordered the release of the person, the legality of whose cus-

tody was in question in the court below and that person is at large. *Cox* v. *Hakes* (15 App. Cas. 506) followed.

(1.) Mignault J., *dubitante.*

(1) Reporters' note. See also *Fraser* v. *Tupper* (Cout. Dig. 104).

Appeal quashed with costs.

Sir Charles Tupper, K.C., for motion.

Sinclair, K.C., contra.

CANADIAN PACIFIC RAILWAY CO. v. ALBIN.

ONT.] [OCTOBER 20TH, 1919.

Railway—Injurious affection to land—Loss of business profits—Compensation—Railway Act S. C. [1906] *c.* 37, *s.* 155.

Where land is injuriously affected by construction of railway works the owner is not entitled to compensation for loss of business profits resulting therefrom. Such compensation can be given only when land is taken.

Sec. 155 of the Railway Act has not so changed the law in Canada as to render the English decisions under the Railway Clause Consolidation Act of 1845 to the above effect inapplicable thereto. Idington and Brodeur, JJ., dissenting.

Judgment of the Appellate Division (45 Ont. L. R. 1,) reversed.

Appeal allowed with costs.

Geary, K.C., and *Colquhoun*, for appellant.

H. J. Scott, K.C., for respondent.

HONSBERGER v. WEYBURN TOWNSITE CO.

ONT.] [14TH OCTOBER, 1919.

Constitutional law—Provincial company—Status ab extra—Comity Right of action—License—Extra-provincial Corporations Act, (*R. S. O.* [1914] c. 179).

Item 11 of sec. 92 B. N. A. Act, 1867, empowering the legislature of any province to make laws in relation to "the incorporation of companies with provincial objects" does not preclude a legislature from creating a company with capacity to accept extra-provincial powers and rights. *Bonanza Creek Gold Mining Co.* v. *The King* followed.

Such capacity need not be expressly conferred. It is sufficient if the intention of the legislature to confer it can be gathered from the instruments creating the company.

A Saskatchewan company may, on obtaining a license under the Extra-provincial Corporations Act (R. S. O. [1914] ch. 179) en-

force in the Ontario courts the performance of a contract entered into with a resident of that Province and an action therefor may be maintained though the license was not granted until after it was instituted.

Judgment of the Appellate Division (45 Ont. L. R. 176) reversing that on the trial (43 Ont. L. R. 451), affirmed.

Appeal dismissed with costs.

Hellmuth, K.C., and *Kingstone*, for appellant.

Tilley, K.C., and *Payne*, for respondent

RILEY v. APEDAILE.

QUE.] [AUGUST 4TH, 1919.

Appeal—Leave to appeal—"Winding-up Act," R. S. C., 1906, *c.* 144, *s.* 106.

Leave to appeal to the Supreme Court of Canada from a judgment in proceedings under the "Winding-up Act" will not be granted, though the amount in controversy exceeds $2,000, if no important principle of law nor the construction of a public Act nor any question of public interest is involved.

Motion dismissed with costs.

Chauvin, K.C., for the motion.

Elder, contra.

LOCAL UNION NO. 1562, U. M. W. A. ET AL. v. WILLIAMS.

ALTA.] [OCTOBER 14TH, 1919.

Trade Unions—Inducing dismissal of non-unionists by threatening strike—Right to damages—Liability of individual members—Practice and procedure — Unincorporated body—Representative action.

The respondents being miners and members of the Local Union appellant, were employed by the Rose-Deer Mining Company. The manager of the company, becoming dissatisfied with the actions of the union, closed the mine down; but he opened it again, and the respondents returned to work, agreeing to the condition not to pay any Union dues. The respondent. Williams, then received an anonymous letter calling him a "scat"; and when a new Local Union was organized, both respondents refused to join until the matter of the letter was "cleared up." Later on, the manager of the Mining Company advised the respondents that they would be discharged unless they settled with the union as he had received notification that the Union would declare a strike if they continued to work. This notification was given by the appellants

Young and Stefanucci. The respondents being subsequently discharged, took an action against the individual appellants on ground of conspiracy to injure them by inducing their dismissal and against the Local Union for unlawful intimidation by the threat of a general strike. The Local Union was not incorporated nor registered under the Trades Union Act; and an application was made at the close of the trial to amend the statement of claim by making the individual appellants defendants in their representative capacity, but this was not granted.

Held that, upon the evidence, the respondent's action should be dismissed, except as to the appellants Young and Stefanucci; Idington and Mignault, JJ., dissenting; Duff, J., would have dismissed the action *in toto*.

Per Duff, J.—The conduct of the appellants cannot be construed as intimidation or coercion by "threat" and did not expose them to an action in damages in the absence of the characteristic elements of a criminal conspiracy to injure. *Quinn* v. *Leathem* [(1901) A. C. 495] discussed.

Per Anglin and Brodeur, JJ.—In the absence of legal evidence that they were present at the meetings where the acts complained of were authorized or that they otherwise have sanctioned them, the mere membership in the Local Union would not render the other appellants personally and individually answerable in damages for the results of these acts.

Per Anglin, Brodeur and Mignault, JJ.—The dismissal of the respondents was the direct and intended outcome of the action of the Local Union's committee, such action amounting to a coercive threat and being, therefore, an unlawful means taken to interfere with the respondents' engagement; and the liability of the Local Union appellant, if being susceptible of being suable, has been established, but the delivery of the message of the committee by the appellants Young and Stefanucci to the manager of the mining company, having regard to all the circumstances, makes them presumably liable towards the respondents.

Per Anglin and Brodeur, JJ.—The issue of want of entity was sufficiently raised by the explicit denial of the allegation that the Local Union was a body corporate.

Per Anglin and Brodeur, JJ.—No action lies against an unincorporated and unregistered body in an action of tort such as the present one. Mignault, J., *dubitante*.

Per Anglin and Brodeur, JJ.—The rule of practice by which, when numerous persons have a common interest in the subject matter of an action, one or more of such persons may be sued on behalf of all persons interested, which rule was invoked in support of the application for an order for representation, cannot properly be applied in an action of tort such as the present one and without evidence that the individual appellants could fairly be said to be properly representatives. Idington, J., contra.

Per Mignault, J., dissenting.—The Local Union having throughout the litigation acted as if having been validly sued, it is too late now to urge the objection of want of entity; and, moreover, the

judgment of the trial judge should not be interfered with on a matter of procedure.

Appeal allowed, except as to the appellants Young and Stefanucci, Idington and Mignault, JJ., dissenting; Duff, J., would have dismissed the action *in toto*.

A. M. Sinclair, K.C., and *H. Ostlund*, for the appellants.

E. V. Robertson, for the respondents.

THE ROYAL BANK OF CANADA v. SKENE ET AL.

B. C.] [OCTOBER 20TH, 1919.

Judgment—Setting aside—Common error of parties.

In a former action between the appellant and the respondents, the trial judge pronounced an oral judgment finding in favour of each party upon some of the contested items of the claim and directed a reference to the registrar. The solicitors then agreed to substitute a report by architects for this reference. It had been expressly stated that it was the respondents' intention to appeal from the judgment. The order, drawn up by agreement and initialled by the solicitor for both parties, apparently deprived the respondents of that right. Subsequently, the respondents appealed; but the appeal was dismissed on the ground that it was a judgment by consent. The respondents then took a direct action to set aside the judgment.

Held, that there had been common error in the expression of the intentions of the parties, and the judgment must be set aside. *Wilding* v. *Sanderson* [1897] 2 Ch. 534, followed.

Judgment of the Court of Appeal ([1919] 3 W. W. R. 740), affirmed

Appeal dismissed with costs.

Tupper and *Bull*, for the appellant.

J. E. McMullen, for the respondents.

B. C. ELECTRIC RLY. CO. v. DUMPHY.

B. C.] [OCTOBER 20TH, 1919.

Negligence—Contributory—Collision—Automobile and street car—Jury's findings—Sufficiency.

The action is for damages for injuries suffered in a collision between an automobile driven by the respondent and appellant's street car. At the trial, one witness for the respondent who was in the automobile, testified to having warned the respondent before the accident; and the respondent was not called to explain his failure to act upon this warning. The jury, after having found the appellant guilty of negligence, specified such negligence in the following

terms: "Insufficient precaution on account of approaching crossing and conditions existing on morning in question."

Held, that the jury's findings, if read with and construed in the light of the issues presented by the pleadings, the evidence and the charge of the trial Judge, were justified both as to appellant's negligence and as to absence of respondent's contributory negligence and were not too vague to support entering of judgment for respondent.

Judgment of the Court of Appeal, ([1919] 3 W. W. R. 201), affirmed.

Appeal dismissed with costs.

W. N. Tilley, K.C., for the appellant.

Mayers, for the respondent.

THE CALGARY AND EDMONTON RLY CO. v. THE SASK. LAND AND HOMESTEAD CO.

ALTA.] [NOVEMBER 10TH, 1919.

Railways—Arbitration—Costs—Award less than costs—Limitation—"Railway Act," R. S. C. 1906, c. 37, s. 199.

The taxable costs, incurred on an arbitration pursuant to the "Railway Act," are constituted by section 199 a debt recoverable by action; and the liability for these costs of the expropriated party is not limited to the amount of the compensation. Idington and Duff, JJ., dissenting.

Per Anglin, J.—The allowances made by the judge cannot be reviewed on appeal for the purpose of establishing that he exceeded his jurisdiction, Brodeur, J., dubitante, and Mignault, J., expressing no opinion.

Judgment of the Appellate Division (14 Alta. L. R. 416; [1919] 2 W. W. R. 297) reversed, Idington and Duff, JJ., dissenting.

Appeal allowed with costs.

W. N. Tilley, K.C., for the appellant.

Frank Ford, K.C., for the respondent.

REID ET AL. v. COLLISTER ET AL.

B. C.] [OCTOBER 21ST, 1919.

Mines and mining—Certificate of improvements—Application for—Affidavit—Cessation of work—"Mineral Act," R. S. B. C. 1911, c. 157, ss. 49, 52, 56, 57.

The respondents, owners of mining claims under the "Mineral Act," complied with all the requirements of section 57 except the filing of the affidavit required by sub-section (g), which they were

prevented from doing owing to the issue of a writ setting up an adverse claim by the appellant, as they could not swear that they were "in undisputed possession" of the claim. The respondents waited for such adverse claimants to proceed with their action and allowed two or three years to elapse without doing further work or making further payment on the claim. Section 49 provides that "if such work (annual work) shall not be done, . . . the claim shall be deemed vacant and abandoned, any rule or law of equity to the contrary, notwithstanding."

Held that, under the circumstances of this case, the respondents were relieved from the necessity of doing further work on the claims pending the issue of the certificate of improvements and that they were freed from the consequences of section 49.

Judgment of the Court of Appeal ([1919] 3 W. W. R. 229), affirmed.

Appeal dismissed with costs.

Mayers, for the appellant.

Bass, for the respondent.

McBRATNEY v. McBRATNEY.

ALTA.] [NOVEMBER 10TH, 1919.

Husband and wife—Will by husband—Relief to wife—Discretion of the court—Intestacy—"The Married Women's Relief Act," Alta. s. 1910, *2nd sess., c.* 18, *ss.* 2 *and* 8.

The discretion conferred on the court in favour of the widow, who applies for relief under "The Married Women's Relief Act," is restricted by implication, to the portion of her deceased husband's estate which she would have received on an intestacy. Idington, J., contra.

Judgment of the Appellate Division ([1919] 2 W. W. R. 685) reversed.

Appeal allowed, costs payable by estate.

O. T. Jones, K.C., for the appellant.

M. B. Peacock, for the respondent.

LOCAL AND PERSONAL.

Capt. E. J. Thomas, M. C., well known in Winnipeg as being equally brilliant in athletics and law, has returned from overseas, where he won his Military Cross with the "Little Black Devils." He is entering into partnership with Mr. Norman McMillan.

Col. J. G. Rattray has been appointed to a position which appears to be an innovation in procedure. It is called the Law Enforcement Department of Manitoba.

Major L. Clare Moyer has entered into a partnership in Regina, to be known as McMurchy and Moyer. He went to the war as a lieutenant, won his majority in the field and received the D. S. O. In addition to his fighting capacity as lawyer and soldier he was an editor for some years.

A. Kennedy Cowper, son of County Crown Attorney Cowper, has started practice in Welland, having at length recuperated from serious wounds received while with the artillery in France.

Garnet Leroy Rodd, nephew of the Crown Attorney, has entered the firm of Rodd, Wigle and McHugh, of Windsor, Ont. His recollections of Anson on Contract will be interspersed with impressions of Vimy Ridge and Hill 70.

OBITUARY.

His Honour J. Lesslie Jennison, senior District Court Judge, Calgary, died on December 1st, after a short illness.

London, Ont., lost its oldest practitioner recently in the death of James H. Flock, K.C. He was 85 years of age and had been practising since 1856. As a City Councillor and one of the most active promoters of the old London, Huron and Bruce Railway, he had done his part in building up the city.

His Honour C. J. Mickle, until recently Judge of the Northern District Court of Manitoba, is dead. Before his elevation to the bench he was remarkably successful in public life, running five times and never losing an election. He held the portfolio of Provincial Secretary in the Greenway Government.

A well known King's Counsel was lost to the Toronto Bar by the death recently of R. S. Neville, who at the time of his death was Assistant Master in Ordinary. He was prominent in political and social circles and some of his essays were interesting contributions to National and Imperial literature.

St. Catharines has lost one of its noted citizens in the person of Matthew J. McCarron. He was known to many by his legal abilities and to still more by his devotion to the charms of Lawn Bowling. He will be long missed among the devotees of the game at their annual tournaments.

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